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Loss of Earning Capcity Benefits in the Community Property Jurisdiction - How Do You Figure.

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ARTICLE

"LOSS OF EARNING CAPACITY" BENEFITS IN THE COMMUNITY PROPERTY JURISDICTION—HOW DO YOU FIGURE?

ALOYSIUS A. LEOPOLD*

I. Introduction 368
II. Comparing the Common-Law System with the Community Property System 372
III. The Community Property System in Texas 376
  A. History and Development 376
    1. The Texas Constitution 377
    2. Texas Statutory Authority and Interpretive Case Law 378
  B. Defining and Distinguishing Separate Property and Community Property: The Inception of Title Theory 380
  C. Consequences of Classifying Property As Separate or Community Property 382
IV. Dividing Loss of Earning Capacity Benefits: The Four Approaches 384
  A. Unitary Approach 385
  B. Mechanistic Approach 388
  C. Analytic Approach 391
  D. Case-by-Case Approach 396

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V. The Division of Workers' Compensation Settlements in *Lewis v. Lewis* 397
A. Improper Statutory Interpretation 399
B. Improper Interpretation of Case Law 400
C. Texas Should Adopt the Analytic Approach to Classify Loss of Earning Capacity Benefits 402
1. Previous Cases Have Used the Analytic Approach in Characterizing Workers' Compensation Benefits 404
2. To the Extent That Benefits Accrue During Marriage, They Are Community Property 406
3. *Lewis* Authority Employs the Analytic Approach 407
4. The Analytic Approach Has Been Used to Characterize Property Analogous to Workers' Compensation Awards 408
a. Tort Recovery for Personal Injury 409
(1) Recovery for Personal Injury: Separate Property 409
(2) Recovery for Medical Expenses and Lost Earning Capacity: Community Property 411
b. Disability Insurance—Why *Andrle v. Andrle* Should Not Be Followed 413
c. Employment Retirement Benefits 415
(1) Property Subject to Division upon Divorce 416
(2) Employment Commenced Prior to Marriage 417
VI. Conclusion 419

I. Introduction

Assume that an employee is injured on the job. In such a case, the injured employee may be entitled to certain types of recovery and benefits. For instance, the employee may be able to receive compensation for pain and suffering, disfigurement or dismemberment, loss of earnings, medical expenses, and loss of consortium.[1]

1. *See* Whittlesey v. Miller, 572 S.W.2d 665, 667 (Tex. 1978) (asserting that the injured spouse has the "exclusive right to recover for the normal damages associated with" direct

Moreover, the employee may also be able to receive a variety of benefits based on the loss of earning capacity, including workers' compensation, disability wage replacement, and personal injury damages. If this employee is not, and has never been, married, then title to these loss of earning capacity benefits is not an issue—the benefits will be considered separate property.[2] However, assume that this employee, after being injured, marries and subsequently divorces. In this latter situation, where the employee's marital status changes, determining the nature of the title as to the loss of earning capacity benefits is quite important.

For example, in the instance of a divorce, a court must know the nature of the title to specific property in order to make an equitable division.[3] This knowledge is particularly important if the court sits in a jurisdiction that does not permit an invasion of the spouses' separate property upon divorce. Determining title to certain property may also affect creditor's rights, as some creditors may have claims only against marital, and not separate, property, or vice versa. In addition, the determination of title may be necessary upon the death of a spouse if the right of inheritance differs with regard to marital and separate property.

Whether property is considered marital or separate property depends upon the jurisdiction and whether it follows the common-law system or the community property system. In a community property jurisdiction, all property brought into or acquired during the marriage is presumed to be community property; in other words, property is held in equal undivided interests by both spouses.[4] Conversely, in a common-law jurisdiction, all property brought into or acquired during the marriage is not jointly owned unless the

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physical injuries in addition to a loss of consortium action); Graham v. Franco, 488 S.W.2d 390, 396 (Tex. 1972) (holding that recovery for personal injuries covers physical pain and suffering as well as disfigurement). In addition, the non-injured spouse may maintain a loss of consortium action. *See Whittlesey*, 572 S.W.2d at 667 (viewing a loss of consortium action as an action independent of the injured spouse's cause of action).

2. *Cf.* TEX. CONST. art. XVI, § 15 (stating that property owned before marriage is the separate property of the owning spouse).

3. *See* TEX. FAM. CODE ANN. §§ 7.001-.002 (Vernon 1998) (requiring the court to consider the rights of the parties in effectuating the award of marital property).

4. *See* 38 ALOYSIUS A. LEOPOLD, TEXAS PRACTICE: MARITAL PROPERTY AND HOMESTEADS § 2.1, at 64 (1993) (defining community property as "property, other than separate property, acquired by either spouse during marriage").

spouses elect to hold the property jointly.[5] Despite these radical differences as to the determination of title, these systems are alike as to loss of earning capacity benefits and determining the rights to such upon divorce. In particular, although both systems assign title differently, each regard property similarly when making a division between husband and wife upon divorce.[6]

The determination of title as to loss of earning capacity benefits upon divorce is complicated—not by the existence of two different marital property systems—but by the fact that the relevant law is extremely convoluted.[7] In fact, courts throughout the United States have not adopted a singular approach to determine title to loss of earning capacity benefits upon divorce. Instead, jurisdictions have relied upon four different methods: the unitary approach, the case-by-case approach, the mechanistic approach, and the analytic approach.[8] Which particular approach is employed varies from jurisdiction to jurisdiction.[9]

Recently, the Supreme Court of Texas implicitly adopted the mechanistic approach in *Lewis v. Lewis*[10] to determine title to benefits for loss of earning capacity upon divorce.[11] In *Lewis*, the

5. In common-law states, the general rule of title to property is simply that a spouse owns all property that a spouse acquires. No common ownership arises solely because of the marriage. However, upon divorce in common-law jurisdictions, earned property is treated as equitably divisible property, thereby equating such property to the same realm as community property in a community property jurisdiction. Also, in order to allay the need to repeat the language regarding both the community property title and the common-law right of division on divorce, this Article will refer to both as "marital property."

6. The purpose of linking common-law and community property jurisdictions is to convert viably the authorities concerning the loss of capacity argument from common-law states as authority in a community property state, such as Texas.

7. In these areas, the title or the right to division of the property depends upon when the property is considered earned. A part of the recovery may be treated as community property, or divisible property, whereas a part may be treated as separate property, or non-divisible property. This concept forms the basis of this Article, which is a discussion of the property principles to be applied to determine the marital nature of the recovery.

8. *See* Crocker v. Crocker, 824 P.2d 1117, 1119-23 (Okla. 1991) (analyzing the four approaches courts use to determine title to loss of earning capacity benefits); *see also* Annotation, *Divorce and Separation: Workers' Compensation Benefits As Marital Property Subject to Distribution*, 30 A.L.R.5th 139, 149-50 (1995) (explaining that jurisdictions have adopted varying approaches to the classification of workers' compensation benefits).

9. *See Crocker*, 824 P.2d at 1119 (acknowledging the lack of uniformity among jurisdictions concerning which approach to use).

10. 944 S.W.2d 630 (Tex. 1997).

11. *Cf.* Lewis v. Lewis, 944 S.W.2d 630, 630 (Tex. 1997) (asserting that a settlement paid during the marriage for a pre-marriage injury is not community property). The mech-

court concluded in a per curium opinion that a lump-sum workers' compensation settlement obtained during the marriage for a premarital injury is the separate property of the injured spouse.[12] Notably, the *Lewis* case creates a hiatus; now, the loss of earning capacity is determined differently in the workers' compensation context than in the personal injury context.[13] In the personal injury context, such awards for loss of earning capacity have long been considered marital property, because they were viewed as a replacement to the lost wages to which the community would otherwise be entitled.[14]

This Article addresses the contradiction posed by the Texas Supreme Court in *Lewis*. Part II of this Article begins by discussing the two marital property systems and their differences. Part III then provides a brief overview of the history and development of the Texas community property system. Part IV presents the various approaches other jurisdictions have taken in order to determine the nature of the title as to loss of earning capacity benefits. Part V analyzes the recent *Lewis* decision by the Texas Supreme Court. Essentially, Part V argues that Texas should adopt the analytic approach in order to determine title to loss of earning capacity benefits. In particular, this Article proposes that the supreme court should have used the analytic approach in regard to loss of earning capacity in *Lewis* because Texas courts have done so with other similar benefits, including retirement benefits and fire casualty benefits. Moreover, this Article urges that, in the interest of uniformity, benefits for the loss of earning capacity should be subject to the same legal principle when determining marital property rights, regardless of the context in which those rights arise.

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anistic approach is essentially the same as the inception of title approach, which measures the marital title at the moment of injury or onset of disability if different from the time of injury. Under this approach, a subsequent change in marital status will not vary the result.

12. *See Lewis*, 944 S.W.2d at 631. The result would be the same if the injury was sustained after the marriage had ended. *See id.* at 631. If the injury-related disability occurred during the marriage, however, the resulting recovery, whether in a lump-sum or in installments, would be marital property, regardless of any continuing marriage. *See id.*

13. *See* Ramsey v. Ramsey, 474 S.W.2d 939, 941 (Tex. Civ. App.—Eastland 1971, writ dism'd) (using an analytic approach when inquiring into the purpose for the Veterans' Administration payments as either separate or community property).

14. *See* 38 ALOYSIUS A. LEOPOLD, TEXAS PRACTICE: MARITAL PROPERTY AND HOMESTEADS § 3.9, at 96 (1993) (explaining that the loss of earning capacity is characterized as community property).

St. Mary's Law Journal, Vol. 30 [1998], No. 2, Art. 1

II. Comparing the Common-Law System with the Community Property System

At common law, a husband and wife were considered one legal entity because they were treated as one "person" in the law with no moieties. In this regard, marriage historically deprived the wife of her separate property, and the husband had the absolute right to control the marital property. Title to property was evaluated in this manner regardless of whether the consideration for property was paid by one spouse or whether it was paid in part by both spouses.[15] In the United States, several jurisdictions adopted this common-law method of determining title to property.[16]

Eventually, states that followed the common-law method were criticized for failing to sympathize with the identity of married women.[17] Subsequently, however, with the help of Married Women's Property Acts, women slowly made headway, gaining personal rights and control of their property.[18] As time passed, such legislation permitted women to hold separate property.[19] In

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15. For a synopsis of the common law with regard to marital property, see generally Cornelius J. Moynihan, Introduction to the Law of Real Property 49-52 (2d ed. 1988) (discussing the common-law concept of dower) and William F. Walsh, A Treatise on the Law of Real Property 146-201 (1915) (devoting a chapter to dower).

16. *See* Scott Greene, *Comparison of the Property Aspects of the Community Property and Common-Law Marital Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 Creighton L. Rev. 71, 76-77 (1973) (pointing out that forty-two American jurisdictions adopted the early common-law property system).

17. *See id.* at 78 (describing the disparity between the marital rights of the husband and wife as profound).

18. *See id.* at 79 (noting that the Married Women's Property Acts "advanced wives' marital property rights under the common-law system"); *see also* Susan Westerberg Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975*, 24 UCLA L. Rev. 1, 4 n.17 (1976) (stating that the Married Women's Property Acts were aimed at removing the common-law disability in married women).

19. *Cf.* Burns v. Burns, 518 So. 2d 1205, 1207 (Miss. 1988) (acknowledging that Mississippi's "constitution and statutes . . . [regarding common-law coverture] were enacted for the purpose of striking down the inequalities existing between husband and wife . . . [and] to emancipate her from the common-law *slavery* to her husband" (emphasis added) (citation omitted)); Krupa v. Green, 177 N.E.2d 616, 622 (Ohio Ct. App. 1961) (explaining that "[a]n examination of the statutes shows the trend toward emancipation of married women from the common law rules of bondage"); Margaret Valentine Turano, *UPC Section 2-201: Equal Treatment of Spouses?*, 55 Alb. L. Rev. 983, 987 (1992) (stating that "the treatment of married women under the common law was so unsatisfactory" that equity courts and, later, statutes gave married women property rights).

fact, today, common-law systems allow both wife and husband to have control of their respective separate property.[20]

In common-law jurisdictions, property acquired by the spouses during marriage is presumed to be marital property.[21] "Marital property," a term used for dividing property upon divorce, has no effect on the common-law title of the respective property of a husband and wife, including earnings.[22] Generally, separate property constitutes one, or a combination, of the following: (1) property acquired before marriage; (2) property acquired during marriage but excluded from marital property because of a valid agreement between the parties; (3) property acquired by gift, devise, or bequest.[23] Title to separate property and marital property is held by either husband or wife individually, or in some form of co-ownership, such as joint tenancy, tenancy in common, or tenancy by the entirety.[24]

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20. *See* Arbesman v. Winer, 468 A.2d 633, 635 (Md. 1983) (declaring that Maryland and other states enacted Married Women's Property Acts "to permit married women, in derogation of the common law, to acquire and hold property for their own use"(citation omitted)); People v. Wallace, 434 N.W.2d 422, 428 (Mich. Ct. App. 1988) (iterating that the Michigan "Supreme Court has repeatedly recognized that the [M]arried [W]omen's [P]roperty [A]cts gave married women the power to protect, control, and dispose of property . . . free from their husband's interference" (citation omitted)); Margaret Valentine Turano, *UPC Section 2-201: Equal Treatment of Spouses?*, 55 ALB. L. REV. 983, 994-95 (1992) (recounting the history of the Married Women's Property Acts and explaining that "[t]he laws were not uniform from state to state, and they accomplished, slowly and over a long period, several different goals," including creating a separate estate for wives).

21. *See* Cameron v. Cameron, 641 S.W.2d 210, 221 (Tex. 1982) (recognizing that in common-law states, each spouse holds an equitable interest to a fair division of jointly owned marital property, even though title may rest in only one spouse's name).

22. *See In re* Marriage of Engle, 646 P.2d 20, 24 (Or. 1982) (asserting that all property acquired by either spouse subsequent to marriage and prior to decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by entirety, or community property).

23. *See* Seidman v. Seidman, 641 N.Y.S.2d 431, 432 (N.Y. App. Div. 1996) (defining separate property as "property acquired before marriage or property acquired [during marriage] by bequest, devise, or descent, or gift from a party other than the spouse").

24. *See* Faulk v. Haskins, 714 P.2d 354, 355-56 (Ala. 1986) (noting that personal property jointly possessed by husband and wife is presumed to be held as tenancy by entirety, and real property is held as tenants by entirety, unless husband and wife state otherwise); Nelson v. Hotchkiss, 601 S.W.2d 14, 17 (Mo. 1980) (en banc) (holding that "a conveyance to a husband and wife as joint grantees ordinarily creates a tenancy by the entirety"); Robinson v. Trousdale County, 516 S.W.2d 626, 632 (Tenn. 1974) (refusing to abolish the estate of tenancy by the entirety, instead stripping the tenancy of the archaic and artificial rules imposed at common law). *But see* Clark v. Clark, 387 P.2d 907, 910 (Mont. 1963)

Nine states, however, have chosen not to adopt the common-law system; instead, these jurisdictions employ the community property approach.[25] Significant differences exist between the common-law system and the community property approach. In a community property jurisdiction, all property acquired and brought into the marriage is presumed to be community property. This presumption continues until either spouse, or someone claiming through or under such a spouse, makes a *prima facie* showing that the property is separate property. In contrast, under the modern common-law system, property is held jointly by husband and wife only if they elect to take title jointly or if property is given to the spouses as a gift. Moreover, property is not jointly owned by both spouses during the marriage; rather, property is only considered common property upon the dissolution of marriage by divorce. Conversely, in a community property jurisdiction, community property is owned jointly by the spouses during the marriage *and* at the dissolution of the marriage.

Although more complex, the community property system allows spouses to be partners with regard to property acquired by the spouses as a marital entity. This notion of a partnership permits each spouse an equitable right in the community estate, regardless of whether the spouse ever contributed property to the marriage.[26]

(rejecting the estate by entireties as a permissible mode of ownership of property in Montana); Davis v. Davis, 75 S.E.2d 46, 47 (S.C. 1953) (noting that the estate of tenancy by the entirety has no longer any existence in South Carolina); Schimke v. Karlstad, 208 N.W.2d 710, 714 (S.D. 1973) (explaining that "estates by entireties have never been recognized" in South Dakota).

25. *See* TEX. CONST. art. XVI, § 15; ARIZ. REV. STAT. ANN. § 25-211 (West 1991); CAL. FAM. CODE § 760 (Deering 1994); IDAHO CODE § 32-906 (1996); LA. CIV. CODE ANN. art. 2338 (West 1985); NEV. REV. STAT. § 123.220 (1995); N.M. STAT. ANN. §§ 40.3-2, 40.3-8 (1994); WASH. REV. CODE ANN. § 26.16.030 (West 1997); WIS. STAT. ANN. § 766.001 (West 1993). Recently, Alaska partially adopted a community property system. *See Keeping Current Property: Legislation*, PROB. & PROP., Sept.-Oct. 1998, at 31 (reporting that Alaska now statutorily requires an individual to have a community property agreement to make community property principles applicable).

26. *See* WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY § 95, at 236-37 (2d ed. 1971) (explaining that the community property relationship functions like a general partnership in that each spouse has both a right to share equally in the gains and an obligation for the liabilities incurred by the community); W.S. MCCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES § 2:29, at 41 (1982) (detailing the assumption that both spouses contribute equally to the acquisition of the marital estate, even though one spouse actually may have acquired the property while the other maintained the home).

Leopold: Loss of Earning Capcity Benefits in the Community Property Jurisd

For instance, although one spouse may choose to be a homemaker who receives no remuneration, such a spouse would nonetheless have rights in the community estate, which would, for example, include the earning of the other spouse. Thus, upon dissolution of the marriage, the homemaker and other spouse would have equal ownership in all community property acquired during their marriage, and each spouse, would be able to maintain title to his or her respective separate property. On the other hand, in a common-law jurisdiction, all property would be individually owned and would remain as such, unless an equitable division of the marital property is made upon the dissolution of marriage by divorce.

Although the common-law and community property approaches differ, some similarities exist. One similarity between the two approaches is the distinction between marital and separate property. This bifurcation is necessary in both community and common-law property jurisdictions because most states do not allow the division of a spouse's separate property. Thus, a court must determine if the property is separate or marital. This determination is necessary because separate property will not be awarded to the other spouse, except for, perhaps, child support. Conversely, marital property is entitled to division upon divorce. Moreover, in a common-law system, each spouse's interest in the marital property is a presumptive one-half.[27] Although not a titled interest, this interest is very similar to the interest that a divorcing spouse has in a community property system.

The similarities between the common-law and community property systems are important in order to draw proper analogies from common-law jurisdiction case law. Merely because Texas classifies marital property according to the community property approach does not mean that precedent regarding marital property from common-law jurisdictions is inapplicable. Rather, in order to develop a proper approach regarding division of marital property, case law from common-law jurisdictions may be helpful. However, before exploring the various methods used to classify marital property, understanding the community property approach in Texas is necessary.

27. *See* RICHARD H. CHUSED, A MODERN APPROACH TO PROPERTY 306 (1978) (stating that each spouse is presumed to have a one-half interest in the marital property upon termination of the marriage).

III. The Community Property System in Texas

A. *History and Development*

Texas is one of the nine states that employs the community property approach to classifying marital property.[28] In fact, the community property system has been an integral part of Texas law since Texas' Spanish beginnings. In 1836, after winning independence from Mexico, the Republic of Texas retained the community property concept in its Constitution.[29] This concept was also carried over into the Texas Constitution and has been statutorily expanded upon since.[30] Furthermore, Texas courts have thrived on community property principles because of the long-held belief that a husband and wife have an equal right to own and hold title to property.[31]

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28. In addition to Texas, the traditional community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, and Washington. *See* William Q. de Funiak & Michael J. Vaughn, Principles of Community Property §1, at 1 (2d ed. 1971); *see also* Tex. Const. art. XVI, § 15; Ariz. Rev. Stat. Ann. § 25-211 (West 1991); Cal. Fam. Code § 760 (Deering 1994); Idaho Code § 32-906 (1996); La. Civ. Code Ann. art. 2338 (West 1985); Nev. Rev. Stat. § 123.220 (1995); N.M. Stat. Ann. §§ 40.3-2, 40.3-8 (1994); Wash. Rev. Code Ann. § 26.16.030 (West 1997). Wisconsin has adopted the Uniform Marital Property Act, which is essentially a community property system, to become the ninth state. *See* Wis. Stat. Ann. §§ 766.001-.97 (West 1993 & Supp. 1997) (adopting the Uniform Marital Property Act).

29. *See generally* 38 Aloysius A. Leopold, Texas Practice: Marital Property and Homesteads §§ 1.1-.47 (1993). Community property has existed for many centuries. The Spanish and French who settled in the new world brought the community property system to the American Southwest. However, even after Texas won its independence from Mexico and became part of the United States of America, it retained the community property system. This brief synopsis of community property is not meant to be exhaustive. Numerous articles have explored the nature of marital property and there is no desire or attempt here to duplicate. *See generally* William Q. de Funiak & Michael J. Vaughn, Principles of Community Property (2d ed. 1971); 38 Aloysius A. Leopold, Texas Practice: Marital Property and Homesteads §§ 2.1-.7 (1993); Charles Sumer Lobinger, *The Marital Community: Its Origin and Diffusion*, 14 A.B.A. J. 211 (1928).

30. *See* Tex. Const. art. XVI, § 15 (adopting the concept of community property); Tex. Fam. Code Ann. § 3.003 (a) (Vernon 1998) (creating a rebuttable presumption that property held by either spouse during or on dissolution of marriage is community property).

31. *See* 38 Aloysius A. Leopold, Texas Practice: Marital Property and Homesteads §§ 1.20-.47 (1993) (discussing the development of Texas' community property system and how wives have, in a variety of ways, been treated equally in regard to property acquired during the marriage).

1. The Texas Constitution

Since 1845, the initial source for the distinction between separate and community property in Texas has been the Texas Constitution.[32] Article 16, Section 15 of the Texas Constitution defines separate and community property by affirmatively setting aside certain property as the separate property of each spouse.[33] In particular, the Constitution defines separate property as "all property, both real or personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent."[34] The Constitution further distinguishes community property from separate property by defining community property through implied exclusion.[35] The Constitution's very wording implies that anything that is not specifically delineated as separate property is community

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32. *See* TEX. CONST. of 1845, art. VII, § 19 (stating that "[a]ll property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or, descent, shall be the separate property; and laws shall be passed more clearly defining the rights of the wife" in relation to separate and community property).

33. *See* TEX. CONST. art. XVI, § 15 (designating all property "owned or claimed before marriage, and that acquired afterward by gift, devise or descent" as separate property).

34. TEX. CONST. art. XVI, § 15. Article 16, Section 15 of the Texas Constitution states:

> All property, both real or personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property; provided that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; spouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse; if one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift or property; and spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse.

Id.

35. The concept used to determine community property is called "implied exclusion" and was championed in *Arnold v. Leonard. See* Arnold v. Leonard, 114 Tex. 535, 539-40, 273 S.W. 799, 802 (1925) (discussing the rule of implied exclusion).

property. Thus, as discussed below, this implied exclusion definition raises a presumption in favor of community property.

2. Texas Statutory Authority and Interpretive Case Law

Section 3.001 of the Texas Family Code embraces the constitutional designations of separate property. However, this section also adds to the definition of separate property "the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage."[36] Although one might debate the constitutionality of this statutory addition to the scope of separate property as defined by the Texas Constitution, the provision remains firmly established to this day.[37]

The Texas Family Code also reaffirms the Constitution's presumption in favor of community property. Section 3.003(a) of the Family Code states that "[p]roperty possessed by either spouse during or on the dissolution of marriage is presumed to be community property."[38] Section 3.003(b) further states that the standard of proof to overcome this presumption is clear and convincing evidence.[39] Hence, for a party to establish property as separate property, that party must trace and clearly identify the property claimed to be separate property.[40] However, a party cannot overcome the

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36. TEX. FAM. CODE ANN. § 3.001 (Vernon 1998). Section 3.001 states:

A spouse's separate property consists of:
1) the property owned or claimed by the spouse before marriage;
2) property acquired by the spouse during marriage by gift, devise, or descent; and
3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.

Id.

37. *See* Graham v. Franco, 488 S.W.2d 390, 391 (Tex. 1972) (upholding the constitutionality of an older codification of Section 3.001(3)). In *Graham*, the statute in question was Section 5.01 of the Texas Family Code which stated that "the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage" is separate property. *Id.* The court held this provision constitutional. *See id.*

38. TEX. FAM. CODE ANN. § 3.003(a) (Vernon 1998).

39. *See id.* § 3.003(b) (stating "[t]he degree of proof necessary to establish that property is separate property is clear and convincing evidence").

40. *See id.* (requiring the existence of separate property to be proven by clear and convincing evidence); McKinley v. McKinley, 496 S.W.2d 540, 543 (Tex. 1973) (explaining a party must clearly identify and trace property claimed to be separate property); *see also* Schmidt v. Huppman, 73 Tex. 112, 115, 11 S.W. 175, 176 (1889) (stating that although separate property has gone through mutations, if it is "indisputably traced and identified" as separate property, then it maintains that character).

community property presumption once property has become so commingled as to lose its separate property identity or where, for whatever reason, the requisite burden of proof cannot be sustained.[41]

Despite the constitutional and statutory authority for the presumption in favor of community property, many courts have taken an alternate, but not inconsistent, view.[42] Cases have minimized such a presumption by employing an affirmative test to identify community property.[43] This test goes beyond the community property presumption and classifies property as community property if it was acquired by the efforts of the husband and the wife.[44] Accordingly, although the constitutional and statutory definitions of community property would appear to be enough to enumerate what is community property, a second means of classifying property, based on when the title right was acquired, has evolved as well. Typically, there is little difference in terms of the practical result. However, the tension between the community property presumption and this latter "inception of title" theory is evident with regard to loss of earning capacity benefits. Because the right

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41. *See McKinley*, 496 S.W.2d at 543; *see also* Tarver v. Tarver, 394 S.W.2d 780, 783 (Tex. 1965) (reiterating the established rule that the commingling of separate and community property does not overcome the community property presumption); Hodge v. Ellis, 154 Tex. 341, 352, 277 S.W.2d 900, 907 (1955) (recognizing that when separate and community property are commingled, the community presumption prevails).

42. Several cases have applied the principles of "implied exclusion" and "onerous title." *See, e.g.*, Norris v. Vaughan, 152 Tex. 491, 498, 260 S.W.2d 676, 680 (1953) (holding the production of gas to be separate property because of the lack of "an expenditure of community funds or effort . . . to impress community character on the gas"); Arnold v. Leonard, 114 Tex. 535, 540, 273 S.W. 799, 802 (1925) (describing the implied exclusion rule as one which prohibits legislators from adding to or withdrawing from circumstances in which a right is acquired); Epperson v. Jones, 65 Tex. 425, 429 (1886) (holding that profits derived from an investment of the wife's separate property would be community property); DeBlane v. Lynch, 23 Tex. 25, 28 (1859) (holding that crops grown on the wife's separate property with all expenses borne by her separate property are community property); Smith v. Strahan, 16 Tex. 314, 324 (1856) (noting that, where the husband purchases land with his separate property funds and puts title in the name of his wife, a gift to her is presumed).

43. *See* Graham v. Franco, 488 S.W.2d 390, 395 (Tex. 1972) (discussing the requirement of property being acquired by community effort to qualify as community property); *Norris*, 152 Tex. at 498, 260 S.W.2d at 680 (requiring the expenditure of community effort or funds for property to be classified as community property).

44. *See Graham*, 488 S.W.2d at 395 (justifying the characterization of recovery for personal injury as separate property on the basis that personal injury is not acquired by community effort); *Norris,* 152 Tex. at 498, 260 S.W.2d at 680 (converting separate property into community property after the expenditure of community funds, talent, and labor).

to such benefits may have been acquired before marriage, any benefits received during marriage are treated as the disabled spouse's separate property. To comprehend this tension fully, a further understanding of the inception of title theory is important.

B. *Defining and Distinguishing Separate Property and Community Property: The Inception of Title Theory*

To determine title to marital property in Texas, one must consider the time of acquisition of the property and the definitions of community and separate property. With regard to determining the time of the acquisition of the property, Texas courts generally utilize the inception of title theory.[45] As mentioned, under this theory, the character of property is determined at the time the property, or any right to the property, is acquired.[46]

Accordingly, any property acquired prior to marriage is characterized as separate property.[47] Moreover, if an asset was owned or possessed during the marriage, the asset is presumed to be commu-

45. The two basic theories utilized to determine the time when marital title is measured are "inception of title" and "apportionment." *See* McCurdy v. McCurdy, 372 S.W.2d 381, 383-84 (Tex. Civ. App.—Waco 1963, writ ref'd) (evaluating the inception of title theory and the apportionment theory to determine the title of an insurance policy purchased before marriage, but for which premiums had been paid from community property during the marriage). In *McCurdy*, the court employed the inception of title theory, holding that because the policy had been acquired before marriage, the title was entirely separate. *See id.* at 384 (believing that the inception of title theory would best promote uniformity). In this regard, title would not be apportioned in accordance with the premiums paid, but the right of the community property would be reimbursement of the premiums paid. *See id.* In reaching this conclusion, the court refused to follow the California rule of apportionment with regard to insurance proceeds and realty, which is followed by the State of Washington. *See id.* at 383.

46. *See* Strong v. Garrett, 148 Tex. 265, 271, 224 S.W.2d 471, 474 (1949) (holding that the husband had a claim of title to land when he first acquired the land, well before his legal title to the land was perfected by adverse possession). In *Strong*, Anderson Strong, while single, bought a tract of land. *See id.* at 269, 224 S.W.2d at 473. The deed, however, erroneously described an adjacent tract. *See id.* Strong went into possession of the land he thought he had purchased, and before the ten-year statute of adverse possession was complete, he married, divorced, and married again. *See id.* The ten-year period was completed during the second marriage. *See id.* The Texas Supreme Court held that the land was his separate property because the inception of title occurred before his first marriage, based upon his right to reform the deed. *See id.* at 271, 224 S.W.2d at 474-75. The right of reformation was a sufficient interest or right in the land to support the inception of title. *See id.*

47. *Cf.* TEX. CONST. art. XVI, § 15 (stating that all property "owned or claimed before marriage" is separate property).

nity property.[48] To overcome this presumption and establish that the asset is separate property, a party must provide clear and convincing evidence[49] that: (1) the property was acquired before marriage,[50] (2) the property acquired during marriage was acquired by gift, descent, or devise,[51] or (3) the property was acquired as the result of a purchase or exchange made with separate property.[52] The inception of title theory establishes a party's right in a particular piece of property[53] and cannot be altered by subsequent acts.[54] For example, when property is purchased on credit acquired prior to marriage, payments made on the purchase indebtedness against the property during marriage do not alter the separate nature of the property; the separate nature of the property remains even if such payments are made from community funds.

48. *See* TEX. FAM. CODE ANN. § 3.003 (Vernon 1998) (stating that "[p]roperty possessed by either spouse during or on dissolution of marriage is presumed to be community property").

49. *See id.* § 3.003(b) (stating that the degree of proof necessary to establish that property is separate is clear and convincing evidence); *see also* Tarver v. Tarver, 349 S.W.2d 780, 783 (1965) (asserting that the statute creates a rebuttable presumption that all property possessed by a husband and wife at dissolution of marriage is community property and imposes the burden upon one asserting otherwise to prove to the contrary).

50. *See* TEX. CONST. art. XVI, § 15 (enunciating that "property, both real and personal, of a spouse owned or claimed before the marriage . . . shall be the separate property of that spouse"); TEX. FAM. CODE ANN. § 3.001(1) (Vernon 1998) (stating that all property acquired by a spouse before marriage is separate property of that spouse).

51. *See* TEX. CONST. art. XVI, § 15 (classifying property acquired after marriage by gift, devise, or descent as separate property); TEX. FAM. CODE ANN. § 3.001(2) (Vernon Supp. 1998) (including property acquired during marriage by gift, devise, or descent in the definition of separate property).

52. *See* McIntyre v. Chappell, 4 Tex. 187, 199 (1849) (explaining that property received from the sale or exchange of separate property is also separate property); Annotation, *Divorce and Separation: Workers' Compensation Benefits As Marital Property Subject to Distribution*, 30 A.L.R.5th 139, 150 (1995) (explaining that "[p]ursuant to most equitable distribution statutes, where premarital property is exchanged during the marriage for other property, the acquired property takes on the character of premarital property"). This concept is termed a "mutation," meaning a change from one type of property to another with a direct link from the first to the second.

53. *See* Strong v. Garrett, 148 Tex. 265, 271, 224 S.W.2d 471, 474 (1949) (using the inception of title theory to give the husband a property right in land).

54. *See* Creamer v. Briscoe, 101 Tex. 490, 493, 109 S.W. 911, 913 (1908) (holding that "title which completes [a property right] relates back to its origin and takes character from it").

C. *Consequences of Classifying Property As Separate or Community Property*

Although the classification of marital property may be a time-consuming process, whether particular property is classified as community or separate property bears directly on the rights of the parties as to that property during and upon termination of the marriage. Typically, all separate property of a spouse in a divorce judgment is awarded to that spouse free of all claims from the community or the other spouse.[55] Conversely, because the spouses are each deemed to have equal rights in community property, community assets are presumptively divided equally between both spouses,[56] unless reasons exist to support an unequal division.[57] Although the title interest owned by each spouse in community property is a one-half undivided present possessory interest, community property is not necessarily divided equally between the spouses upon termination of the community. The Texas Family Code grants the trial court the power to divide the community estate in any manner the court deems just and right.[58] Therefore, at

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55. *See* Cameron v. Cameron, 641 S.W.2d 210, 215 (Tex. 1982) (explaining that, in a divorce proceeding, separate property is ordinarily not subject to divestiture by the courts); Hailey v. Hailey, 331 S.W.2d 299, 302 (Tex. 1960) (holding that the court may not divest a party of legal title to real estate in divorce cases).

56. *See* Stafford v. Stafford, 726 S.W.2d 14, 16 (Tex. 1987) (affirming an equal division of the community property against the wife's assertion that she was entitled to a greater share because of the husband's adultery and her lesser income). In *Stafford*, the supreme court held that these were only two of many circumstances that the trial court could consider. *See id.* That the trial court would start with an equal division and adjust as the equities of the circumstances require is logical.

57. *See, e.g.*, Murff v. Murff, 615 S.W.2d 696, 698 (Tex. 1981) (indicating that "the trial court may consider such factors as the spouses' capacities and abilities, . . . relative financial condition and obligations, disparity of ages, size of separate estates, and the nature of the property"); Young v. Young, 609 S.W.2d 758, 762 (Tex. 1980) (holding that the fault of one spouse may be considered when making a property division).

58. *See* TEX. FAM. CODE ANN. § 7.001 (Vernon 1998) (empowering the court upon divorce or annulment to "order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage"). This just and right division is also the basis for the equitable division of marital property in common-law jurisdictions. *See, e.g.*, 23 PA. CONS. STAT. ANN. § 3502 (West 1991) (mandating that, "[i]n an action for divorce or annulment, the court shall . . . equitably divide, distribute, or assign, in kind or otherwise, the marital property between the parties . . . in such manner as the court deems just after considering all relevant factors . . . "); McArthur v. McArthur, 353 S.E.2d 486, 488 (Ga. 1987) (explaining that, "in determining the manner in which marital property is to be equitably divided, the factfinder is authorized to exercise its discretion after considering all relevant factors . . . ").

the time of divorce, the spouses are not guaranteed an equal share of such assets simply because an asset is classified as community property.[59]

Notably, even though Texas courts may consider the separate property of each spouse in the just and right division of the community property, courts may not divide the separate estates of the spouses.[60] Particular constitutional concerns arise from the divestiture of a spouse's separate property.[61] In fact, the United States Supreme Court has recognized that the award of the separate property of one spouse to the other upon dissolution of marriage is a taking of property that cannot be justified by a public purpose.[62] Therefore, although the nature and extent of the separate estates may be considered,[63] constitutional concerns limit the trial court's ability to divide the spouses' separate property upon divorce.[64] Thus, a proper classification of property as marital or separate is quite important, particularly when an equitable division of the marital property by the court would be impossible otherwise. To this end, four methods have evolved that reflect different approaches to ascertaining title to property.

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59. A discussion of the division of property brought from a non-community property jurisdiction, sometimes called "quasi-community," is not necessary here, except to note that this property is of the same nature as property termed "marital property" in common-law jurisdictions. Marital property is actually separate property, equitably divisible upon divorce because it was earned. *See* TEX. FAM. CODE ANN. § 7.002 (Vernon 1998); *Cameron*, 641 S.W.2d at 220. The term "quasi-community" seems to be derived from California jurisprudence. *See* CAL. FAM. CODE § 125(b) (Deering 1996) (defining "quasi-community" property as property from a non-community jurisdiction that would have been community property if acquired in California).

60. *See Cameron*, 641 S.W.2d at 213 (forbidding divestiture of a spouse's separate property); Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 139 (Tex. 1977) (disallowing the division of separate property).

61. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (citing the United States Constitution as grounds for the protection of private property).

62. *See id.* at 414-15 (requiring a significant public purpose to constitutionally justify a taking).

63. *See* Murff v. Murff, 615 S.W.2d 696, 699 (Tex. 1981) (identifying the size of the spouses' separate estates as a factor when dividing community property).

64. *See Eggemeyer*, 554 S.W.2d at 141 (holding that the trial court may set aside the separate property, income, rents, or revenues of either spouse for the support of minor children); James N. Castleberry Jr., *Constitutional Limitations on the Division of Property upon Divorce*, 10 ST. MARY'S L.J. 37, 41 (1978) (discussing the constitutional limitations on the legislature's ability to create separate property).

St. Mary's Law Journal, Vol. 30 [1998], No. 2, Art. 1

IV. DIVIDING LOSS OF EARNING CAPACITY BENEFITS: THE FOUR APPROACHES

Both community and non-community jurisdictions grant the trial court discretionary authority to divide marital assets in a manner that the court finds is just and right.[65] In this respect, jurisdictions have devised various methods to distribute such assets. In particular, jurisdictions have adopted any of four main approaches to determine the nature of the title to property upon dissolution of marriage. These approaches include the unitary approach, the analytic approach, the mechanistic approach, and the case-by-case approach. These approaches are also useful for deciding how to distribute disability benefits upon divorce with regard to the loss of a spouse's earning capacity.[66] Although these approaches have typically been used soley in workers' compensation cases, they are

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65. The trial court generally has discretion to divide the marital property of the parties as appears just and equitable. *See, e.g.*, HAW. REV. STAT. ANN. § 580-47 (Michie 1997 & Supp. 1998); MINN. STAT. ANN. § 518.58 (West 1995); OKLA. STAT. ANN. tit. 43, § 121 (West 1990 & Supp. 1998); OR. REV. STAT. § 107.105 (1995); 23 PA. CONS. STAT. ANN. § 3502 (West 1991 & Supp. 1998); S.D. CODIFIED LAWS § 25-4-44 (Michie 1992 & Supp. 1998); UTAH CODE ANN. § 30-35 (1998); VT. STAT. ANN. tit. 15, § 751 (1989 & Supp. 1998); VA. CODE ANN. § 20-107.3 (Michie 1995 & Supp. 1998); WYO. STAT. ANN. § 20-2-114 (Michie 1997). In Texas, the separate property of spouses is not subject to the just and right division power of the trial court. *See, e.g.*, Cameron v. Cameron, 641 S.W.2d 210, 213 (1982) (explaining that such a division would ignore the distinction between community and separate property); Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 140, 142 (1977) (reversing the trial court's division of the husband's separate property because the tial court had no legislative or constitutional authority to transfer his separate property to his wife).

Several other jurisdictions protect the spouses' separate property in a similar manner. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 5/503-d (West 1998); KY. REV. STAT. ANN. § 403.190 (Michie 1996); ME. REV. STAT. ANN. tit. 19, § 722-A (West 1996); MD. CODE ANN., FAM. LAW § 8-205 (1997); MO. ANN. STAT. § 452.330 (West 1997); N.Y. DOM. REL. LAW § 236 (McKinney 1986 & Supp. 1998); N.C. GEN. STAT. § 50-20 (1994); OHIO REV. CODE ANN. § 3105.171 (West 1992); OKLA. STAT. ANN. tit. 43, § 121 (West 1998); 23 PA. CONS. STAT. ANN. § 3504 (West 1991); R.I. GEN. LAWS § 15-5-16.1 (1996); S.C. CODE ANN. § 20-7-473 (Law. Co-op. 1997); TENN. CODE ANN. § 36-4-121 (1996); W. VA. CODE § 48-2-21 (1996). However, a minority of states allow the trial court to divest the spouse of separate property. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-81 (West 1995); IND. CODE ANN. § 31-1-11.5-11 (Michie 1997); MONT. CODE ANN. § 40-4-202 (1997); S.D. CODIFIED LAWS § 25-4-44 (Michie 1992); VT. STAT. ANN. tit. 15, § 751 (1998).

66. *See* Crocker v. Crocker, 824 P.2d 1117, 1119-23 (Okla. 1991) (analyzing the four approaches courts use to determine title to loss of earning capacity benefits); *see also* Annotation, *Divorce and Separation: Workers' Compensation Benefits As Marital Property Subject to Distribution*, 30 A.L.R.5th 139, 149-50 (1995) (explaining that jurisdictions have adopted varying approaches to the classification of workers' compensation benefits).

equally applicable to other benefits that replace an individual's loss of earning capacity.

A. *Unitary Approach*

The unitary approach is the most simplistic of the four approaches.[67] Under the unitary approach, an award for a work related injury resulting in lost earning capacity is the separate property of the injured spouse, regardless of the surrounding circumstances.[68] The rationale behind this approach is that a person's health is that person's separate property.[69] Hence, because a workers' compensation award compensates the injured spouse for an injury to his health, workers' compensation benefits must also be the separate property of the injured spouse.[70] Essentially, the unitary approach requires a court to do nothing more than identify the injury, determine the corresponding recovery, and then grant the appropriate sum to the injured spouse. Despite this simplicity, the unitary approach has been applied only in a few jurisdictions.[71]

New Mexico is one jurisdiction that has employed the unitary approach. In *Richards v. Richards*,[72] the issue before the state supreme court was whether compensation payable under the state's workers' compensation statute for work related injuries sustained during the marriage was community property.[73] The problem arose when, after six years of marriage, the husband suffered

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67. *See Crocker*, 824 P.2d at 1120 (describing the unitary approach as the most simplistic).

68. *See* Annotation, *Divorce and Separation: Workers' Compensation Benefits As Marital Property Subject to Distribution*, 30 A.L.R.5th 139, 150 (1995) (describing the unitary approach as one where workers' compensation benefits are the injured spouse's separate property, "no matter what the nature of the benefits").

69. *See Crocker*, 824 P.2d at 1120 (explaining that the unitary approach designates the compensation award as being "uniquely personal" to the injured spouse); Annotation, *Divorce and Separation: Workers' Compensation Benefits As Marital Property Subject to Distribution*, 30 A.L.R.5th 139, 150 (1995) (implying that a healthy body is separate property).

70. *See* Annotation, *Divorce and Separation: Workers' Compensation Benefits As Marital Property Subject to Distribution*, 30 A.L.R.5th 139, 150 (1995) (elaborating that because workers' compensation substitutes for a healthy body, a separate property of the injured spouse, the workers' compensation award is also the separate property of the injured spouse).

71. *See Workers' Compensation Awards*, 14 EQUITABLE DISTRIBUTION J. 1, 1-2 (1997) (listing Delaware, Maryland, Missouri, Oregon, Utah, and Wisconsin as jurisdictions that have followed the unitary approach).

72. 283 P.2d 881 (N.M. 1955).

73. *See* Richards v. Richards, 283 P.2d 881, 881 (N.M. 1955).

St. Mary's Law Journal, Vol. 30 [1998], No. 2, Art. 1

an accidental injury that rendered him totally and permanently disabled.[74] For this disability, the husband was awarded $30 per week in benefits.[75]

In determining whether the trial court correctly characterized the nature of the workers' compensation benefits, the New Mexico Supreme Court looked to the purpose of the state's workers' compensation statute.[76] The court noted that New Mexico's workers' compensation statute does not base the amount of benefits on an increase or decrease in the injured employee's earning power, but rather on a change in the severity of the disability.[77] The court viewed this basis as a change from pre-statute law, which allowed recovery based on an increase or decrease in earning power.[78] The court reasoned that this shift in rationale should be considered when interpreting the statute.[79] Thus, the court concluded that the nature of the workers' compensation award was more closely related to the bodily injury than the inability to earn income.[80] Hence, the court held that the award was separate property.[81]

In reaching its decision, the court also relied on Louisiana precedent, which had concluded that the language of the statute determines the nature of a workers' compensation recovery.[82] The *Richards* court noted that it need look no further than the statute itself to determine the nature of a workers' compensation recov-

74. *See id.*

75. *See id.*

76. *See id.* at 882.

77. *See id.*

78. *See id.* (accepting the proposition that an "increase or decrease in earning power is no longer the yardstick").

79. *See id.* (interpreting this change in rationale as providing additional support for holding the compensation to be the separate property of the injured spouse).

80. *See id.* (interpreting the 1945 amendment to New Mexico's workers' compensation statute).

81. *See id.*

82. *See id.* (quoting Brownfield v. Southern Amusement Co., 198 So. 670, 673 (La. Ct. App. 1940)). The dissenting opinion criticizes the majority for misreading the legislative intent of the workers' compensation statute and contends that a proper rendition would be based on the fact that the compensation is based on the amount of weekly wages being compensated for and not the injury. *See id.* at 883 (Sadler, J., dissenting) (criticizing the majority for failing to recognize that workers' compensation should take on the same characteristic as the property it replaces). Under this analysis, the purpose of the statute would be to compensate for lost wages and therefore, would be community property.

Leopold: Loss of Earning Capcity Benefits in the Community Property Jurisd

ery.[83] Although the *Richards* court acknowledged that other jurisdictions have reached conclusions differing from its own,[84] the court distinguished the contrary holdings by stating that the workers' compensation statutes of those jurisdictions require different results.[85] Thus, although *Richards* may appear incorrect under community property law analysis, the result is demanded by an interpretation of the controlling statutory provisions.[86] Moreover, *Richards* illustrates that although the four approaches described in this Article may result in varying outcomes, each approach begins with an analysis of the controlling statutory requirements of the jurisdiction.

Ultimately, the use of the unitary method in determining title to workers' compensation benefits is quite limited. Under the unitary method, workers' compensation benefits are treated as separate property.[87] Yet, in states whose statutes treat such benefits instead as wage replacement or lost capacity benefits, these benefits are marital property during the marriage; in these states, the unitary method cannot apply. Rather, the unitary method applies only in states whose statutory schemes treat workers' compensation benefits as compensation for pain and suffering, which are necessarily characterized as separate property.

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83. *See id.* at 882. The result under the Louisiana statute renders creditors of the non-injured spouse unable to seek attachment or seizure of the compensation, thereby rendering the property separate rather than community in nature. *See id.*

84. *See id.* (acknowledging that Arizona, California, and Texas have reached different conclusions). In Texas, the workers' compensation system is based on calculating the employee's weekly average salary, and the employee is compensated for loss of earning capacity. *See* Employers Reinsurance Corp. v. Holland, 347 S.W.2d 605, 606 (Tex. 1961) (declaring that "[w]e have long held that the purpose of the [Workers' Compensation] Act is to compensate an injured employee, not for the loss of earnings or for the injury itself, but for loss of earning capacity"). A statute in Texas defining separate property similar to the New Mexico statute would probably not be constitutional.

85. *See Richards*, 283 P.2d. at 882. The dissent, however, claims that the cases cited by the majority from Arizona, California, and Texas are "direct authority against [the majority] and are not to be disregarded by reason of any supposed statutory differences." *Id.* at 883 (Sadler, J., dissenting).

86. *See id.* at 882 (distinguishing Arizona, California, and Texas cases on the ground that those cases were controlled by their respective statutes, and these statutes are different from the New Mexico statute).

87. *Cf.* Annotation, *Divorce and Separation: Workers' Compensation Benefits As Marital Property Subject to Distribution*, 30 A.L.R.5th 139, 139 (1995) (defining the unitary approach as one where workers' compensation benefits are the injured spouse's separate property).

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B. *Mechanistic Approach*

The mechanistic approach is arguably the easier approach to employ when determining whether a workers' compensation settlement or other loss of earning capacity claim is community or separate property. In determining the character of the property, the mechanistic approach relies on the exact time the right to such property accrues and is also referred to as the "inception of title" view.[88] Three justifications support applying the mechanistic approach to determine the nature of title.

First, most jurisdictions applying the mechanistic approach cite an interpretation of their marital dissolution statutes.[89] In this respect, the purpose for which the compensation might be granted is irrelevant.[90] For example, in *Orszula v. Orszula*,[91] the Supreme Court of South Carolina held that a workers' compensation award for injuries sustained during marriage was marital property.[92] In so concluding, the court relied solely on its determination that the recovery was not an enumerated exception to that state's marital property statute.[93] Hence, by default, the claim was property acquired during marriage and subject to the equitable division by the

88. *See, e.g., In re* Marriage of Thomas, 411 N.E.2d 552, 553 (Ill. App. Ct. 1980) (holding that the time of the claim governs the classification of the award as marital property); Weakley v. Weakley, 731 S.W.2d 243, 245 (Ky. 1987) (stating that compensation for an injury occurring before marriage is the injured spouse's separate property, regardless of when the actual judgment or settlement is completed); Marsh v. Marsh, 437 S.E.2d 34, 36 (S.C. 1993) (relating that the time the award was made determines whether it is marital property).

89. *See, e.g., In re* Marriage of Dettore, 408 N.E.2d 429, 431 (Ill. App. Ct. 1980) (citing cases that interpret the Illinois Dissolution Act); Johnson v. Johnson, 638 S.W.2d 703, 704 (Ky. 1982) (relying upon state statutory provisions to determine whether a workers' compensation award received during a divorce action is marital property); Hagen v. Hagen, 508 N.W.2d 196, 198 (Mich. Ct. App. 1993) (citing state statutory workers' compensation provisions and interpreting case law); Orszula v. Orszula, 356 S.E.2d 114, 114 (S.C. 1987) (using a state statutory provision defining marital property to find that workers' compensation awards are not marital property).

90. *See Marsh*, 437 S.E.2d at 35 (explaining that under the mechanistic approach, "if the award or settlement is acquired during the marriage, it is deemed marital property regardless of the underlying purpose of the award or the loss it is meant to replace").

91. 356 S.E.2d 114 (S.C. 1987).

92. *See Orszula*, 356 S.E.2d at 114 (holding that personal property, including workers compensation awards, is marital property).

93. *See id.* at 115 (explaining that workers' compensation awards do not fit any of the enumerated exceptions to the marital property law).

trial court.[94] *Orszula*, thus, illustrates how the nature of the workers' compensation award is not a consideration under the mechanistic approach.[95]

The second justification for the mechanistic approach is the expectancy theory. Indeed, at least one jurisdiction has disregarded a statutory analysis, instead utilizing an expectancy rationale to support its employment of the mechanistic approach.[96] In *Weakley v. Weakley*,[97] the Kentucky Supreme Court determined the distribution of a personal injury settlement in the following two instances: (1) when the injury and settlement occurred during marriage, and (2) when the injury occurred prior to marriage but the settlement was reached during marriage.[98]

Although not directly dealing with a claim for workers' compensation, the Kentucky court alluded to the similarity between personal injury cases and workers' compensation cases;[99] in both instances the court noted that a similar analysis should be applied.[100] Thus, in *Weakley*, the court concluded that in a situation where both the injury and settlement occur during marriage, the compensation serves to replace the parties' expected earnings.[101] In other words, the assumption exists that but for the injury, the spouse's earning capacity would have remained constant,[102] and the uninjured spouse, having married a spouse with earning capacity, had an expectation that such earning capacity or money replacing the capacity would continue.

The *Weakley* court further stated that where the duration of the injury might extend beyond the period of the marriage, the settle-

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94. *See id.* (finding that workers' compensation and personal injury awards fit within none of the statutorily enumerated exceptions, thus failing to qualify as separate property). It would thus appear that the "implied exclusion" concept is also usable to determine marital property in a common-law jurisdiction.

95. *See id.* at 114-15 (analogizing the workers' compensation award to wages, thus finding no error in distribution of the workers' compensation award as a substitute).

96. *See* Weakley v. Weakley, 731 S.W.2d 243, 244-45 (Ky. 1987) (dividing property on the basis of the spouses' expectations in the future).

97. 731 S.W.2d 243 (Ky. 1987).

98. *See Weakley*, 731 S.W.2d at 244 (outlining two fact patterns concerning the timing of the settlement).

99. *See id.* (citing two cases dealing with workers' compensation claims).

100. *See id.* (analogizing personal injury compensation for permanent impairment and loss of wages for an injury that occurs during marriage to workers' compensation).

101. *See id.* at 244.

102. *See id.*

ment that corresponds to post-marriage compensation is the separate property of the injured spouse.[103] However, in light of this determination, the *Weakley* court then suggested that a different result is reached when the injury occurs prior to the marriage.[104] When a mechanistic analysis is applied to the division of lump-sum workers' compensation settlement, the time the injury occurred and the time the right to a chose in action accrued are apparently determinative in characterizing the property.[105] Accordingly, the Kentucky court opined that if the settlement is for an injury that occurred before marriage, the entire settlement is the separate property of the injured spouse, regardless of the nature of the recovery.[106] The court reasoned that the marital community has no right to the injured spouse's pre-marital recovery because the injured spouse is expected to generate income during the marriage only to the extent permitted by the disability.[107] The *Weakley* court also explained that the prospective spouse takes the partner as he or she finds the partner, with no expectation of more.[108] The rationale behind this explanation is that because the uninjured spouse married with knowledge of the incapacity, nothing more should be expected.[109]

103. *See id.* (designating as non-marital property that amount of the compensation for loss of earnings that can be prorated to compensate for loss of earnings after the end of the marriage). Apparently, there is no expectancy that compensation received after divorce from an injury during marriage would be marital property. To this extent, the expectancy theory differs from the pure inception of title theory.

104. *See id.* at 244-45 (distinguishing between a premarital injury and a during marriage marital injury).

105. *See* Marsh v. Marsh, 437 S.E.2d 34, 35 (S.C. 1993) (describing the mechanistic approach as one where the compensation is marital or community property if it is received during marriage, irrespective of the compensation's purpose); Annotation, *Divorce and Separation: Workers' Compensation Benefits As Marital Property Subject to Distribution*, 30 A.L.R.5th 139, 150 (1995) (defining the mechanistic approach as one where the timing of the award is critical).

106. *See Weakley*, 731 S.W.2d at 245 (disentitling anyone who marries an incapacitated person from any share of recovery for the incapacity).

107. *See id.* (supporting the reasoning using the expectancy theory).

108. *See id.* (stating that the prospective spouse takes the injured person in such condition at the date of the marriage).

109. *See id.* (reasoning that the spouse of the disabled employee could reasonably expect that the disabled spouse's earning capacity would continue during marriage). One could argue that the spouse married with the expectancy that the compensation continue, particularly if the compensation is payable in installments, and that this compensation be in the form of marital property.

Although *Weakley* did not involve workers' compensation, the court inferred that a similar result would occur in a workers' compensation case.[110] The *Weakley* court suggested that, in the formation of the marital community, each spouse is entitled to expect the current condition of the other to continue through the duration of the marriage.[111] Such an analysis suggests that where the injury leading to a workers' compensation settlement occurs prior to marriage, the other spouse should not expect any compensation or income based on such an occurrence. Hence, the award should be considered as only compensating the injured spouse for property that the spouse had prior to marriage with the marriage not affecting the separate character of that property.[112]

A third justification for the mechanistic approach is the inception of title theory. Under this theory, the moment of incapacity is the determinative point for ascertaining title to the disability benefits.[113] Subsequent events, such as a change in marital status and time of receipt of benefits, are immaterial.[114]

C. *Analytic Approach*

The analytic approach to the division of marital property, also known as the apportionment method, has a large following among the states.[115] This approach requires the court to determine the nature of the award—that is, what the underlying loss is—and the nature of the workers' compensation statute from the outset.[116]

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110. *See id.* at 244 (describing personal injury awards for loss of earning capacity as "similar" to workers' compensation awards).

111. *See id.* (stating that both the injured party and his spouse have an expectation that, but for the injury, the earning capacity would have continued).

112. *See id.* (describing title to disability benefits for an injury that occurred prior to marriage as being separate property because title vested prior to marriage). However, compensation for lost property is distinctly different from compensation for the inability to earn income.

113. *See* Lewis v. Lewis, 944 S.W.2d 630, 630 (Tex. 1997) (stating that the character of compensation benefits paid during marriage is determined not by the time of the injury, but when the loss of earning capacity occurred).

114. *Cf.* Creamer v. Briscoe, 101 Tex. 490, 492, 109 S.W. 911, 912 (1908) (reasoning that title always relates back and takes character from its origin).

115. *See* Crocker v. Crocker, 824 P.2d 1117, 1122 n.12 (Okla. 1991) (listing both community and non-community states that follow the analytic approach).

116. *See* Weisfeld v. Weisfeld, 545 So. 2d 1341, 1345 (Fla. 1989) (describing the analytic approach as an approach that looks at the nature of the compensation award to ascertain whether the award is marital or separate property); Eric W. Maclure, Freeman v.

Crocker v. Crocker,[117] a case decided by the Oklahoma Supreme Court, illustrates this approach.

In *Crocker*, the court enunciated four factors to help determine the nature of a compensation award under the analytic theory.[118] According to the court, one relevant factor is the purpose of the award; for example, the award may be for lost earnings, loss of future earning capacity, or another purpose.[119] The second factor is the time period of any diminished earning potential or disability.[120] The third factor to consider is the nature and date of the underlying injury.[121] Finally, the terms of the compensation award warrant consideration as well.[122]

Clearly, under the analytic approach, the court must evaluate the nature of the award itself.[123] Such a task involves breaking the award into component parts and determining what part of the award, if any, is the separate property of the injured spouse and what part, if any, is marital property.[124] Under the analytic approach, the court is justified in examining the timing of the award as well as the circumstances under which the compensation is awarded.[125]

Freeman: *Adopting the Analytic Approach to Equitable Distribution of Workers' Compensation Awards*, 71 N.C. L. REV. 2065, 2077 (1993) (remarking that the focus of the analytic approach is to determine what the compensation award is replacing); Annotation, *Divorce and Separation: Workers' Compensation Benefits As Marital Property Subject to Distribution*, 30 A.L.R.5th 139, 150 (1995) (defining the analytic approach as one where the underlying nature of the loss must be examined).

117. 824 P.2d 1117 (Okla. 1991).

118. *See Crocker*, 824 P.2d at 1122 (enunciating four issues that states have addressed in considering whether compensation awards are separate or marital property).

119. *See id.*

120. *See id.*

121. *See id.*

122. *See id.*

123. *See id.* at 1121 (requiring courts that follow the analytic approach to look at the underlying nature of the compensation award); Annotation, *Divorce and Separation: Workers' Compensation Benefits As Marital Property Subject to Distribution*, 30 A.L.R.5th 139, 150 (1995) (describing the analytic approach as one which requires an examination of the underlying nature of the loss).

124. *See* Annotation, *Divorce and Separation: Workers' Compensation Benefits As Marital Property Subject to Distribution*, 30 A.L.R.5th 139, 150 (1995) (explaining the mechanics of the analytic approach).

125. In both the mechanistic and the analytic approaches, the workers' compensation award would ordinarily be for lost earning capacity. In *Crocker*, the Oklahoma Supreme Court found the time of the loss to be paramount when it stated that "[i]n Oklahoma, the dispositive issue in evaluating workers' compensation benefits as separate or marital prop-

Additionally, a court may look at several factors to determine the reason behind an award of compensation.[126] Among the factors that a court may consider are the type and date of injury and whether the employee is significantly hindered from performing the job.[127] In evaluating these factors, the court is asking merely

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erty, is not whether the right to receive benefits vested during the marriage, but rather to the extent to which the award compensates for loss of earning capacity during the marriage." *Crocker*, 824 P.2d at 1122.

126. *See* Weisfeld v. Weisfeld, 545 So. 2d 1341, 1345 (Fla. 1989) (explaining that the court should look to the nature of the injury to determine whether compensation is separate property); De Rossett v. De Rossett, 671 N.E.2d 654, 657 (Ill. 1996) (listing factors, such as age, health, employability, pain and suffering, and disability, when considering whether to divide a workers' compensation award among spouses).

127. *See* Merrill v. Merrill, 368 P.2d 546, 548 n.4 (Alaska 1962) (including time and manner of acquisition, as well as health and physical conditions of parties as factors to consider when deciding whether injury compensation constitutes marital property). The specific facts surrounding the workers' compensation settlement often provide the best method for determining the award's purpose. *See, e.g.*, Bandow v. Bandow, 794 P.2d 1346, 1350 (Alaska 1990) (arguing that circumstances dictate the purpose of the award and the appropriateness of its allocation as separate property); Miller v. Miller, 739 P.2d 163, 165 (Alaska 1987) (noting that the extent to which an award compensates loss of earnings is determination of the marital nature of the property); Dawson v. McNaney, 223 P.2d 907, 910 (Ariz. 1950) (stating that allowances for personal injury awards are based upon loss of earning capacity); Hatcher v. Hatcher, 933 P.2d 1222, 1225 (Ariz. Ct. App. 1996) (maintaining that the component parts of destitute benefits may be separate or community property depending on the intended purpose); *In re* Marriage of Cupp, 730 P.2d 870, 872 (Ariz. Ct. App. 1986) (holding that portions of lump-sum disability awards paid during marriage that are for future lost wages are separate property); *In re* Marriage of Bugh, 608 P.2d 329, 331 (Ariz. Ct. App. 1980) (asserting that workers' compensation benefits received after dissolution of marriage for an injury occurring during the marriage are separate property); *In re* Marriage of Robinson, 126 Cal. Rptr. 779, 781 (Cal. Ct. App. 1976) (deciding that disability payments to the disabled spouse become separate property); *Weisfeld*, 545 So. 2d at 1345 (delineating the proper allocation of an award into community versus separate property depending on its purpose); Dees v. Dees, 377 S.E.2d 845, 846 (Ga. 1989) (basing the award distribution on the nature of the damage remedied by the particular portion of the award); Cook v. Cook, 637 P.2d 799, 801 (Idaho 1981) (stressing that property defines its character from the nature of the right violated); West v. Ortego, 325 So. 2d 242, 247 (La. 1975) (requiring that compensation after dissolution of the marriage may be separate property); Queen v. Queen, 521 A.2d 320, 327 (Md. 1987) (remanding the case to determine facts governing the allocation of the award based on loss of future earning ability); *In re* Marriage of Ward, 453 N.W.2d 729, 732 (Minn. Ct. App. 1990) (characterizing the right to personal financial security as separate property); Wilk v. Wilk, 781 S.W.2d 217, 223 (Mo. Ct. App. 1989) (requiring additional fact finding in order to properly allocate a workers' compensation award as community or separate property); Pauley v. Pauley, 771 S.W.2d 105, 107 (Mo. Ct. App. 1989) (assessing specific facts to determine the purpose of benefit payments); Schmitz v. Schmitz, 841 P.2d 496, 499 (Mont. 1992) (classifying a workers' compensation award as community property); Lentini v. Lentini, 565 A.2d 701, 702 (N.J. 1989) (concluding that equitable distribution of that portion of an award intended to compensate future loss earnings was required); Johnson v. Johnson, 346 S.E.2d 430, 435 (N.C. 1986)

St. Mary's Law Journal, Vol. 30 [1998], No. 2, Art. 1

whether the award is to replace lost bodily security or whether the award is to replace lost earning capacity.

When the underlying purpose of the workers' compensation settlement is to compensate the employee for bodily injury, the trial court may determine upon dissolution of the marriage that the award is the separate property of the injured spouse.[128] Such a determination would be based on the fact that the award was not acquired onerously but rather was compensation for an injury to the afflicted spouse.[129] Because each spouse's body is likened to separate property, compensation for injury to the body is likewise separate.[130]

Conversely, if the underlying purpose of the settlement is to compensate for lost earning capacity, then a trial court may determine that a workers' compensation award is marital property. In Texas, such could very well be the case because the Texas Supreme Court has long held that the purpose of the Texas Workers' Compensation Act[131] is to compensate the injured worker for the inability to work.[132] In fact, as recently as six years ago, a Texas appellate court relied on the premise that the purpose of workers'

(identifying loss of earnings during marriage and expenses paid as a segment of an award properly designated as marital property); Hartzel v. Hartzel, 629 N.E.2d 491, 492 (Ohio Ct. App. 1993) (distinguishing the vesting of benefits for the purposes of compensation); Kirk v. Kirk, 577 A.2d 976, 979 (R.I. 1990) (looking to the purpose of workers' compensation benefits in determining the appropriateness of equitable distribution).

128. *See Hartzel*, 629 N.E.2d at 492 (opining that workers' compensation benefits that compensate for "the loss of a body part" are not marital property); *cf. Bugh*, 608 P.2d at 331 (explaining that a personal security right is separate property that is brought into the marriage; therefore, compensation for harm to that personal security is also separate property, even if the harm occurs during marriage); *Crocker*, 824 P.2d at 1122 n.11 (classifying damages for pain, suffering, and disability as the separate property of the injured spouse under the analytic approach).

129. *Cf. Bugh*, 608 P.2d at 331 (characterizing compensation for harm to personal security as separate property because the personal security right is not acquired during the marriage).

130. *See id.* (asserting that an individual's personal security right is separate property); *Hartzell*, 629 N.E.2d at 492 (excluding personal injury compensation from the realm of marital property); *Kirk*, 976 A.2d at 979 (including as separate property compensation for disfigurement and loss of limb).

131. Texas Workers' Compensation Act, 73d Leg., R.S., ch. 269, § 1, 1993 Tex. Gen. Laws 987 (codified in TEX. LAB. CODE ANN. §§ 401.001-418.002 (Vernon 1996)).

132. *See* Texas Employers Ins. Ass'n. v. Clack, 134 Tex. 151, 154, 132 S.W.2d 399, 402 (1939) (listing the compensation of injured employees as one of the underlying purposes of compensation statutes).

compensation is to compensate the injured employee for the lack of earning capacity, not for lost earnings, or for the injury itself.[133]

The premise that the award is for the loss of earning capacity can further be evidenced by the fact that the workers' compensation award, as computed under a statute, is for replacement of lost wages.[134] For example, in Texas, workers' compensation is awarded when the average weekly earnings of the employee after the work-related injury are less than the average weekly earnings prior to the injury.[135] Thus, if an award is for the replacement of lost wages, a trial court may determine that the award is marital property.

Another factor that must be determined is whether the workers' compensation vested prior to the marriage or after the divorce.[136] In such a case, as with retirement benefits, wherein the entire portion of the benefit is earned prior to the marriage, the property is generally the separate property of the employee spouse.[137] However, if the benefits are not earned prior to marriage but over the course of the marriage, courts generally apportion the benefits between marital and separate property, depending upon what portions were earned before and during the marriage.[138]

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133. *See* Service Lloyds Ins. Co. v. Martin, 855 S.W.2d 816, 820 (Tex. App.—Dallas 1993, no writ) (reiterating that the purpose of the Act is to compensate for the loss of earning capacity and not just lost wages); *see also* Employers Reinsurance Corp. v. Holland, 162 Tex. 394, 395, 347 S.W.2d 605, 606 (1961) (stating that the purpose of the Act is to compensate injured employees for loss of earning capacity, not just lost wages).

134. *See Holland*, 162 Tex. at 395, 347 S.W.2d at 606 (referring to the average weekly earning capacity as a factor in the calculation of loss of earning capacity).

135. *See id.* at 395, 347 S.W.2d at 606 (claiming that replacement of loss wages is a goal of workers' compensation).

136. *Cf.* Cook v. Cook, 637 P.2d 799, 802 (Idaho 1981) (downplaying the significance of the vesting of the right to workers' compensation). The *Cook* court illustrates that though vesting is a factor, it is not dispositive. *See id.* Rather, the crucial factor is whether the benefits compensate for "loss of earning capacity during marriage." *Id.*

137. *See In re* Marriage of Bugh, 608 P.2d 329, 332 (Ariz. Ct. App. 1980) (referring to general community property principles to support the statement that an individual's earnings after the termination of a marriage belong to that individual as separate property).

138. *See id.* at 332 (noting that when the "earnings received after dissolution are in the form of retirement benefits . . . and are deferred compensation for work performed during the marriage, then there is a community property interest in the earnings"); Weakley v. Weakley, 731 S.W.2d 243, 244-45 (Ky. 1987); General Ins. Co. of Am. v. Casper, 426 S.W.2d 606, 610 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.) (finding that workers' compensation constituted community property because a divorce decree dissolved the marriage after the plaintiff sustained injury).

St. Mary's Law Journal, Vol. 30 [1998], No. 2, Art. 1

A similar analysis could be applied to workers' compensation lump-sum settlements. For instance, when the entire settlement is in lieu of earnings prior to or subsequent to the marriage, the settlement is not intended to provide compensation for the period during the marriage.[139] In this regard, any benefits should be considered separate property.[140] However, if the compensation is awarded for injuries that manifest themselves in the form of lost earning capacity over a period of time, including time during marriage, the compensation should, at least partially, be marital property.[141]

D. *Case-by-Case Approach*

Rather than adopting a single method by which to determine the nature of a workers' compensation lump-sum settlement, several jurisdictions have opted to determine the nature of such assets on a case-by-case approach.[142] In doing so, courts generally reason that adopting one of the other methods would mislead the trial courts rather than provide them with a method by which to ensure the proper disposition of a party's marital assets.[143] However, this view

139. *See Bugh*, 608 P.2d at 332 (deciding that compensation awards received at the termination of the marriage retained their separate property status); *Weakley*, 731 S.W.2d at 245 (holding that compensation for injuries occurring prior to marriage is separate property).

140. *See* Miller v. Miller, 739 P.2d 163, 165 (Alaska 1987) (holding as separate property a workers' compensation award that compensates for the loss of earnings after dissolution of marriage, even when the injury occurred during marriage); *Cook*, 637 P.2d at 802 (stressing that benefits for lost earning power outside of marriage is the separate property of the injured spouse); Hartzell v. Hartzell, 629 N.E.2d 491, 492 (Ohio Ct. App. 1993) (designating as separate property that portion of a workers' compensation award that does not compensate for loss of earning capacity during marriage).

141. *See Hartzell*, 629 N.E.2d at 492 (subjecting that portion of benefits that compensate for loss of earnings during marriage to a division as marital property); *Cook*, 637 P.2d at 802 (relying upon the presumption in community property jurisdictions that property acquired during marriage is community property).

142. *See In re* Marriage of McNerney, 417 N.W.2d 205, 208 (Iowa 1987) (adopting the case-by-case approach); Annotation, *Divorce and Separation: Workers' Compensation Benefits As Marital Property Subject to Distribution*, 30 A.L.R.5th 139, 150 (1995) (indicating that certain states are not clear as to which method is to be used to characterize workers' compensation benefits). *But see* Crocker v. Crocker, 824 P.2d 1117, 1120 n.4 (stating that, in *McNerney*, the court implicitly adopted the mechanistic approach).

143. *See McNerney*, 417 N.W.2d at 206, 208 (preferring the case-by-case-approach over the analytic and mechanistic approaches, both of which the court viewed as misleading). However, the *McNerney* court in dividing the property of the spouses applied what would be considered the mechanistic approach to the marital property division. *See*

appears to be the least principled because it requires the trial court to make an ad hoc decision in each case. In addition, this approach ultimately provides the trial court with little guidance.

V. The Division of Workers' Compensation Settlements in *Lewis v. Lewis*

As previous sections have highlighted, how title to disability payments is determined varies tremendously. A need for certainty in this area of the law exists, particularly in light of a 1997 Texas Supreme Court case, *Lewis v. Lewis*,[144] which upset the unifying principles in Texas community property jurisprudence. As explained in Part I, the community property is presumed to be property earned or accrued during marriage. Courts have also utilized the inception of title theory to classify property based on when the *right* to the property was acquired. However, in light of *Lewis* the application of these principles to disability benefits becomes somewhat confused.

In Texas, the underlying problem in determining title to disability benefits upon dissolution of the marriage is the ambiguity of the language in the Texas Family Code concerning title to lost earning capacity.[145] In fact, two particular questions arise: Does the phrase "personal injuries . . . during marriage" refer to a bodily trauma suffered during the marriage or to the results of a bodily trauma, whenever suffered, that are manifest during marriage? Furthermore, does the phrase "loss of earning capacity during marriage" refer to the moment of the injury or to the time when the loss from the injury is experienced? If the phrases refer to bodily trauma at the moment of injury, the statute is espousing the mechanistic view. If, on the other hand, the terms of the statute refer to the results of the bodily trauma or to the time when the loss is experienced, the statute espouses an analytic view.

Recently, the Supreme Court of Texas in *Lewis v. Lewis* had an opportunity to resolve the problem posed by the language of the

Crocker, 824 P.2d at 1120 n.4 (accusing the *McNerney* decision of employing, for practical purposes, the mechanistic approach).

144. 944 S.W.2d 630 (Tex. 1997).

145. *See* Tex. Fam. Code Ann. § 3.001 (Vernon 1998) (stating that "[a] spouse's separate property consists of: . . . (3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage").

St. Mary's Law Journal, Vol. 30 [1998], No. 2, Art. 1

Family Code. Unfortunately, the court forewent this opportunity to clarify how title to benefits for the loss of earning capacity should be determined. Thus, the *Lewis* decision by the supreme court only added to the uncertainty in the community property system and the laws upon which it is based.

In *Lewis*, the husband received $30,000 during the marriage as settlement of a workers' compensation claim for an injury suffered prior to the marriage.[146] Approximately one-half of this settlement was used to buy land deeded to both Thomas Lewis and his wife, Eva Lewis.[147] Subsequently, Eva filed for divorce.[148] At divorce, the issue was whether the land purchased was separate or community property.[149] In a per curiam opinion, the supreme court held that the land was separate property.[150]

In crafting its conclusion, the court first had to ascertain the nature of the title to the workers' compensation settlement.[151] The court characterized the workers' compensation settlement as separate property.[152] The court reasoned that because the land was bought with separate property, the land was separate property as well.[153]

Although the reasoning that the property purchased with separate property is likewise separate property is fully justifiable, the supreme court's initial characterization of the workers' compensation settlement as separate property is insupportable. In fact, the *Lewis* decision can be criticized in three areas: (1) for its statutory interpretation; (2) for its interpretation of case law; and (3) for its approach to the division of property upon divorce.

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146. *See* Lewis v. Lewis, 944 S.W.2d 630, 630 (Tex. 1997).

147. *See id.*

148. *See id.*

149. *See id.* Thomas Lewis believed the land to be his separate property because the land was purchased with his separate settlement funds. *See id.* Eva Lewis believed the land to be community property because the settlement funds were acquired during the marriage. *See id.*

150. *See id.* at 631.

151. The *Lewis* court had to ascertain first the nature of the settlement funds because if the settlement funds are separate property, then the land purchased with the settlement funds is separate property as well. *See* McIntyre v. Chappell, 4 Tex. 187, 195 (1849) (noting that property received from the sale or exchange of separate property is also separate property).

152. *See Lewis*, 944 S.W.2d at 630.

153. *See id.* at 631.

A. *Improper Statutory Interpretation*

The statutory interpretation criticism of *Lewis* centers around the definition of separate property in Section 3.001 of the Texas Family Code. In holding that the workers' compensation award was separate property, the court relied upon the predecessor to Section 3.001 of the Texas Family Code.[154] In addition to specifically defining separate property, Section 3.001, like its predecessor, *excludes* from the definition of separate property "any recovery for loss of earning capacity during marriage."[155] In *Lewis*, the controversy was over the meaning of the term "during" as used in the statute.[156]

The *Lewis* court concluded that the use of "during" meant a one-time event referring to the point in time when the loss of earning capacity was first sustained.[157] Accordingly, under the supreme court's interpretation of the Family Code, Mrs. Lewis was not entitled to any of her husband's workers' compensation benefits because he suffered the injury that gave rise to the benefit *before* the marriage.[158] Moreover, the court reasoned that because the injury occurred before the marriage, Mr. Lewis' loss of earning capacity began before the marriage.[159] Thus, the court concluded that although the workers' compensation benefits were not received until Mr. Lewis was married, they were his separate property.[160] The supreme court further noted that the only way for a workers' compensation settlement to be considered community property would be if the spouse's loss of earning capacity occurred during the marriage.[161]

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154. *See id.* at 630-31 (relying upon Section 5.01(a) (3), the predecessor to Section 3.001 of the Texas Family Code).

155. TEX. FAM. CODE ANN. § 3.001 (Vernon 1998).

156. The basic question for this Article is what does "during the marriage" mean in the context of a "loss of earning capacity?" As a brief introduction, we might ask whether it means at the moment of injury or at the moment of loss when considered as replacement for a certain specific time of inability to labor.

157. *See Lewis*, 944 S.W.2d at 630 (concluding that the loss of earning capacity was fully incurred before marriage).

158. *See id.* at 631.

159. *See id.*

160. *See id.*

161. *See id.* (declaring the rule that compensation for loss of earning capacity that occurred outside of marriage is separate property). Furthermore, it can be reasonably inferred from the *Lewis* opinion that if the spouse suffers from a loss in earning capacity

In deciding *Lewis*, the Texas Supreme Court might have been misdirected. A better interpretation of the Family Code is that "during" does not refer to the time of the injury, but to the time of the lost earning capacity by virtue of the inability to work occurring during the marriage. In other words, the workers' compensation payment corresponding to any period during the marriage in which the husband was unable to work would be community property. Under this interpretation, Mrs. Lewis would be entitled to consideration of her husband's workers' compensation benefits in the property division. Thus, because Mr. Lewis chose to get married, his "loss of earning capacity" during the life of his marriage to Mrs. Lewis would be community property.[162] Basically, because the Family Code states that separate property is "the recovery for personal injuries sustained by the spouse during marriage, *except* any recovery for loss of earning capacity during marriage"[163] and because Mr. Lewis' loss of earning capacity continued throughout the marriage, the benefits would be considered community property for the period of time that they applied to his marriage.

B. *Improper Interpretation of Case Law*

The second criticism of the supreme court's decision in *Lewis* is its interpretation of case law. The *Lewis* court cited only two cases to support the proposition that title to marital recovery for lost earning capacity is determined by the time of the injury.[164] However, careful examination of the cases the *Lewis* court cited reveals that they are factually distinct from the circumstances in *Lewis*, and therefore, do not support the court's conclusion.[165]

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during marriage, the compensation for that loss in earning capacity is always marital property.

162. This argument essentially is the apportionment, or analytic approach, that was discussed in *supra* Part IV.C. of this Article.

163. TEX. FAM. CODE ANN. § 3.001 (Vernon 1998) (emphasis added).

164. *See Lewis*, 944 S.W.2d at 631 (citing Charter Oak Fire Ins. Co. v. Few, 456 S.W.2d 156, 160 (Tex. Civ. App.—Tyler 1970), *rev'd on other grounds*, 463 S.W.2d 424 (Tex. 1971), and General Ins. Co. of Am. v. Casper, 426 S.W.2d 606, 608 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.)).

165. *Compare Lewis*, 944 S.W.2d at 630 (stating that the husband had "suffered a work-related injury resulting in immediate permanent disability . . . " seven months *prior* to marrying his wife and had received a compensation settlement ten months *after* such marriage), *with* Charter Oak Fire Ins. Co. v. Few, 456 S.W.2d 156, 158 (Tex. Civ. App.—Tyler), *rev'd on other grounds*, 463 S.W.2d 424 (Tex. 1971) (relating that the plaintiff-wife was married to her spouse both before and at the time of the accident forming the basis of

The *Lewis* court cited *Charter Oak Fire Insurance Co. v. Few*[166] and *General Insurance Co. of America v. Casper*.[167] In *Few*, a Texas court of appeals held that when the disability occurred during a marriage, the wife had a community property interest in any settlement received.[168] Similarly, in *Casper*, a court of appeals reasoned that no community property would result from compensa-

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the claim), *and Casper*, 426 S.W.2d at 607 (reciting the facts of the case, including that the injured spouse was married at the time of the injury but was divorced at the point in time when her incapacity began; however, she subsequently remarried her former husband during the time in which benefits were accruing to the injured spouse).

166. 456 S.W.2d 156 (Tex. Civ. App.—Tyler 1970), *rev'd on other grounds*, 463 S.W.2d 424 (Tex. 1971). In *Charter Oak Fire Insurance Co. v. Few*, a wife who was injured on the job brought a workers' compensation claim. *See Few*, 456 S.W.2d at 157-58. The wife sued the insurance company for total and permanent job-related disability and joined her husband in the suit *pro forma*. *See id.* The insurance company asserted that the suit was for the recovery of community property and that the husband was an indispensable party. *See id.* at 158 (stating that defendant's points of error raised the issue of whether it was proper to enter a judgment for the community when the husband was not a real party). The supreme court reversed the intermediate court, stating that "Mary Frances Few and her husband, Milburn Few, had been married for many years prior to her accident on June 20, 1968, and they are still married. For this reason her workmen's compensation award was their community property." Few v. Charter Oak Fire Ins. Co., 463 S.W.2d 424, 425 (Tex. 1971). The supreme court, however, held that the wife had the right to manage the cause of action alone, and the husband was not an indispensable party. *See id.* at 427-28 (holding that the injured party, Mary Frances Few, could sue for workers' compensation benefits without joining her husband).

167. 426 S.W.2d 606 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.). In *General Insurance Co. of America v. Casper,* the wife, Zelda Casper was married to the husband, Odis Moore in 1962. *See Casper*, 426 S.W.2d at 607. The wife sustained an accidental injury on April 1, 1964 but did not begin to suffer disability until December 11, 1965. *See id.* Meanwhile, the two were divorced on June 29, 1964. *See id.* The court held that no community interest in the benefits for incapacity resulted from the 1964 injury during the 1962 marriage because "[n]o cause of action arose by reason of appellee's [wife's] injury until some incapacity to appellee resulted therefrom." *Id.* at 608.

Thereafter, on January 1, 1965, the parties remarried. *See id.* The testimony was that they were married only a short time, but the date of the second divorce was not proven. *See id.* The court found that for at least some time after the 1965 onset of disability, the parties were married. *See id.* (finding "no competent evidence that the 1965 marriage of Zelda Casper and Odis Moore has actually been dissolved by a divorce decree"). The court held that "[i]t is clear that, under Texas law, workmen's [(sic)] compensation benefits for incapacity by reason of a general injury that *accrues during marriage* constitute community property." *Id.* at 608. The court held that because some part of the disability, which had begun during the second marriage, some part of the benefits were community property. *See id.* at 610.

168. *See Few*, 456 S.W.2d at 160.

St. Mary's Law Journal, Vol. 30 [1998], No. 2, Art. 1

tion benefits paid when the wife's injuries occurred during marriage but her disability began after divorce.[169]

At first glance, these two cases appear to state merely that when an injured spouse suffers a loss of earning capacity during the marriage, the other spouse has a community property interest in any compensation received during the marriage. The *Lewis* court concluded from these two cases, however, that the moment of disability is the deciding factor in characterizing such benefits.[170] Apparently, the court analogized cases where the loss of earning capacity begins after divorce to cases where the loss of earning capacity occurs before marriage. Although such an analogy simplifies the characterization of compensation benefits, it disregards the notion of apportionment in community property.[171]

C. *Texas Should Adopt the Analytic Approach to Classify Loss of Earning Capacity Benefits*

The third problem underlying the *Lewis* decision is the approach the court used to determine each spouse's right to the workers' compensation award upon divorce. The *Lewis* court utilized a mechanistic approach, which determines marital title to property based on the time the right accrues.[172] Although the mechanistic approach is one of four acceptable approaches to determining title,[173] a more equitable result would have resulted if the court had utilized the analytic approach. In light of *Lewis* and the ensuing confusion regarding loss of earning capacity benefits, Texas courts stand poised at a juncture between the mechanistic and the analytic approaches.

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169. *See Casper*, 426 S.W.2d at 608 (referring to the first marriage between the parties, which had ended in divorce before the wife's disability began).

170. *See Lewis*, 944 S.W.2d at 631 (emphasizing the timing of the loss of earning capacity as the key to characterizing compensation received for that injury).

171. *See generally supra* notes 115-41 and accompanying text. Although neither the Texas Constitution in Article XVI, Section 15 nor the Texas Family Code definition of separate property in Section 3.001 speak of apportionment, their wording is not inimical to the concept.

172. *See Lewis*, 944 S.W.2d at 631 (focusing on the timing of the loss of earning capacity and ignoring the purpose for the workers' compensation settlement).

173. *See* Crocker v. Crocker, 824 P.2d 1117, 1119-23 (Okla. 1991) (examining the different approaches); *see also* Annotation, *Divorce and Separation: Workers' Compensation Benefits As Marital Property Subject to Distribution*, 30 A.L.R.5th 139, 149-50 (1995) (noting the existence of various approaches to determining the character of workers' compensation benefits).

In Texas, courts have utilized both methods, depending on the nature of the transaction.[174] In ordinary contract situations, such as contracts to purchase land and life insurance contracts, courts have used the mechanistic approach.[175] In these cases, marital status at the making of the contract is the determining factor.[176] The mechanistic approach has been followed in adverse possession cases as well.[177] Conversely, courts have followed the analytic theory in retirement cases.[178] Under this theory, that portion of the retirement that corresponds to a ratio of time worked towards retirement during the marriage is community property and the remainder is the separate property of the retired spouse.[179] Because compensation for lost earning capacity is more closely analogous to these later cases than to cases involving contract rights or adverse possession, the analytic approach should be used in calculating benefits for the loss of earning capacity.

However, in order to promote consistency in resolving title to property, similar types of property should be treated in a like man-

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174. *Compare* Berry v. Berry, 647 S.W.2d 945, 947 (Tex. 1983) (applying the analytic approach to retirement benefits), *with* McCurdy v. McCurdy, 372 S.W.2d 381, 382 (Tex. Civ. App.—Waco 1963, writ ref'd) (employing the mechanistic approach to the determination of title to life insurance contracts).

175. *See McCurdy*, 372 S.W.2d at 382, 384 (adopting the inception of title theory to characterize life insurance proceeds from a policy issued before marriage); Bishop v. Williams, 223 S.W. 512, 514 (Tex. Civ. App.—Austin 1920, writ ref'd) (reviewing a contract for the purchase of land).

176. *See McCurdy*, 372 S.W.2d at 382 (stating that the main consideration is whether title was acquired before marriage); Colden v. Alexander, 171 S.W.2d 328, 334 (Tex. 1943) (explaining that the character of the title of the property as either separate or community depends solely on the parties' marital status at the time title was acquired).

177. *See* Strong v. Garrett, 148 Tex. 265, 270, 224 S.W.2d 471, 474 (Tex. 1949) (utilizing the inception of title theory to give the husband a property right in land before the title was perfected by adverse possession).

178. *See Berry*, 647 S.W.2d at 945 (considering the value of retirement benefits); Cearley v. Cearley, 544 S.W.2d 661, 661 (Tex. 1976) (reviewing a grant of military retirement benefits).

179. *See Berry*, 647 S.W.2d at 947 (requiring apportionment when the value of retirement benefits are at issue); *Cearley*, 544 S.W.2d at 666 (approving a method of apportionment for "contingent interests in military retirement benefits"). An argument might even be made that, instead of the inception of title theory, the apportionment theory should be applied as the only rule. To this end, for a more universal application of the apportionment rule in derogation of the inception of title rule, see Forbes v. Forbes, 257 P.2d 721, 722 (Cal. Dist. Ct. App. 1953), which extends a community property interest in proportion to the percentage of payments made by community property funds, and *In re* Coffey's Estate, 81 P.2d 283, 286 (Wash. 1938), which divides the proceeds of a life insurance policy if the premiums are paid with community funds.

ner, even when placed in different contextual settings. Such similar treatment is vital to a workable marital property system in any jurisdiction. Yet, *Lewis* diverges from Texas precedent by utilizing a mechanistic approach only in lost capacity cases. In the past, Texas cases involving workers' compensation awards have utilized the analytic approach.[180] Likewise, cases involving property analogous to workers' compensation awards have also utilized the analytic approach.[181] Thus, this Article advocates the use of the analytic approach, also known as the apportionment approach, for classifying loss of earning capacity benefits in order to unify the Texas marital property system.

1. Previous Cases Have Used the Analytic Approach in Characterizing Workers' Compensation Benefits

The issue of whether workers' compensation is community property has been addressed several times during the judicial history of Texas.[182] In fact, as early as 1921, Texas courts have considered at least some aspect of workers' compensation to be community property.[183] In *Texas Employers' Insurance Association v. Boudreaux*,[184] the supreme court determined that workers' compensation benefits were community property.[185] In so doing,

180. General Ins. Co. of Am. v. Casper, 426 S.W.2d 606, 608 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.) (holding that the husband did not have a community property interest in his wife's compensation benefits where the injury occurred during marriage, but the disability began after divorce); *see also infra* notes 192-93.

181. *See* Humble v. Humble, 805 S.W.2d 558, 562 (Tex. App.—Beaumont 1991, writ denied) (holding that the trial court did not abuse its discretion in applying the apportionment theory to a retirement plan); *accord* Bandow v. Bandow, 794 P.2d 1346, 1348 (Alaska 1990) (applying the analytic approach to proceeds from an annuity that resulted from a tort settlement); Johnson v. Johnson, 346 S.E.2d 430, 450-51 (N.C. 1986) (adopting the analytic approach in a case involving proceeds from a personal injury suit).

182. *See, e.g.*, Few v. Charter Oak Fire Ins. Co., 463 S.W.2d 424, 425 (Tex. 1971) (holding the workers' compensation award to be community property); Texas Employers' Ins. Ass'n v. Boudreaux, 231 S.W. 756, 758 (Tex. Comm'n App. 1921, holding approved) (favoring the view of a workers' compensation award as community property); *Casper*, 426 S.W.2d at 610 (holding any portion of a workers' compensation award that accrues during marriage to be community property).

183. *See Boudreaux*, 231 S.W. at 758 (reasoning that because workers' compensation has its source in the same contract as the contract for wages, the compensation "partake[s] more nearly of the nature of community than of separate property").

184. 234 S.W. 756 (Tex. Comm'n App. 1921, holding approved).

185. *See id.* (stating that the compensation was measured and derived from community wages, and thus should be distributed by statute guiding descent and distribution).

the court noted that the compensation was incidental to the employee's employment contract.[186] In other words, because workers' compensation benefits were computed based on the wages of the employee, the workers' compensation benefits could take on the same character as the wages the employee spouse earned.[187]

Texas courts have also held that a claim for unpaid installments of workers' compensation benefits does not survive the death of the employee.[188] However, such a lack of survivorship does not preclude an apportionment argument.[189] When the earned compensation is owed to one spouse, it becomes the community property of both spouses.[190] To that extent, an action for compensation that was to accrue for a time during the marriage would necessarily be the community property of the spouses.[191] Thus, any amount of recovery due to a spouse that did not accrue during the period of the marriage would not be considered community property.[192] Therefore, the possibility exists that a portion of the compensation could be community property and a portion might remain the separate property of the injured spouse, at least to the extent that the

186. *See id.* (explaining that compensation arises from the relationship between the employer and the deceased employee).

187. *See id.* (concluding that the employee spouses' wages are community property).

188. *See* Antwine v. Dallas Indep. Sch. Dist., 698 S.W.2d 226, 227 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (holding that the only claim that survived death was for benefits accrued and unpaid from the date of injury until the date of death).

189. *See* Cearley v. Cearley, 544 S.W.2d 661, 666 (Tex. 1976) (approving the method of apportionment). *Antwine* actually supports the apportionment theory as well because it essentially equated workers' compensation installments to be paid after death to wages that would not be earned until after death. *See Antwine*, 698 S.W.2d at 227.

190. *See* Pickens v. Pickens, 125 Tex. 410, 412, 83 S.W.2d 951, 953 (Tex. Comm'n App. 1935) (holding that a plaintiff is entitled to half of compensation earned by the employee spouse).

191. *See* Miller v. Miller, 739 P.2d 163, 165 (Alaska 1987) (holding as community property a workers' compensation award that compensated for lost earnings during the marriage); Hartzell v. Hartzell, 629 N.E.2d 491, 492 (Ohio Ct. App. 1993) (regarding the portion of a workers' compensation benefit that compensates for lost earnings during the marriage as marital property).

192. *See* Hicks v. Hicks, 546 S.W.2d 71, 73 (Tex. Civ. App.—Dallas 1976, no writ) (stating that workers' compensation for a post-marital disability is separate property even if the injury occurred during marriage); Piro v. Piro, 327 S.W.2d 335, 336-37 (Tex. Civ. App.—Fort Worth 1959, writ dism'd) (prohibiting the division of the portion of a workers' compensation award that has not accrued prior to the termination of the marriage).

rights to such benefits accrue after the termination of the marriage.[193]

2. To the Extent That Benefits Accrue During Marriage, They Are Community Property

Texas courts have stated several times that, to the extent benefits accrue during marriage, they are community property.[194] This result has been reached traditionally by determining that the spouses were already married when the disability began.[195] Presumably, because the spouses had a community interest in the wages the injured spouse earned, any compensation awarded in replacement of such wages would properly be characterized as community property.[196] In contrast, however, when the workers' compensation award is intended to compensate the injured spouse for a period outside the marriage, such awards have consistently not been con-

193. *See Piro*, 327 S.W.2d at 336 (acknowledging the possibility of dividing that part of the compensation that has accrued before dissolution of the marriage because such property is community property). However, a court cannot divide compensation that accrues after dissolution of the marriage. *See id.* at 336-37 (explaining that to reach into and divide compensation that accrues after divorce amounts to a prohibited "judicial compulsory assignment of compensation benefits belonging to the single individual" and not the community).

194. *See* Patt v. Patt, 689 S.W.2d 505, 509-10 (Tex. Civ. App.—Houston [1st Dist.] 1985, no writ) (dismissing the husband's argument for an entitlement to a greater portion of the community estate upon divorce for funds of a workers' compensation settlement expended on community assets because the husband failed to establish that any portion of the workers' compensation settlement was his separate property); York v. York, 579 S.W.2d 24, 26-27 (Tex. Civ. App.—Beaumont 1979, no writ) (affirming the trial court's reliance on the community property presumption in holding that a workers' compensation award received during marriage is community property). In *York*, the court reasoned that where the spouse is seeking to claim an asset upon divorce as separate property and does not bring forth satisfactory evidence, the party has failed to rebut the community property presumption and the property is properly divided as community property. *See id.* at 26.

195. *See* General Ins. Co. of Am. v. Casper, 426 S.W.2d 606, 608 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e) (announcing "it is clear that . . . workmens' compensation benefits for incapacity by reason of a general injury that *accrues* during marriage constitute community property").

196. In a substantially similar situation, a Texas court of appeals held that Veterans Administration (VA) disability benefits are separate property, to the extent that they are paid as compensation for the inability to engage in gainful employment after the divorce of the spouses, even though the disability arose from a war-related injury during the marriage. *See* Ramsey v. Ramsey, 474 S.W.2d 939, 941 (Tex. Civ. App.—Eastland 1971, writ dism'd) (characterizing the VA payments as separate property because the payments were for "service-connected disabilities paid to [the husband] after the granting of the divorce").

sidered community property.[197] Courts have held that granting the non-injured spouse rights in such assets would result in the unlawful divestment of the injured spouse's separate property.[198]

Nonetheless, an issue arises with workers' compensation benefits because they are intended to compensate the injured party for a loss in earning capacity.[199] For instance, where the loss occurs during marriage, the benefits are considered community property.[200] However, upon termination of the marriage, each spouse loses his or her interest in the other spouse's earning capacity, thereby converting the earning capacity from one of community interest to one of separate interest. Assuming this rationale is true, when the compensation is intended to compensate the injured spouse for the inability to earn income for a period beyond the divorce, the asset should be considered the separate property of the injured spouse.[201]

3. *Lewis* Authority Employs the Analytic Approach

Ironically, the analytic theory was also used in one of the cases relied upon by the *Lewis* court. *General Insurance Company of America v. Casper*[202] involved a dispute over a claim for total permanent disability.[203] The claim was instituted in December 1965 for an injury that had occurred in April 1964.[204] After an unfavora-

197. *See* Rucker v. Rucker, 810 S.W.2d 793, 795 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (noting that "worker's compensation benefits, received after divorce, are not community property"); Hicks v. Hicks, 546 S.W.2d 71, 73-74 (Tex. Civ. App.—Dallas 1976, no writ) (stating that "compensation for disability for a period after divorce is not community property, even though the injury may have occurred when the parties were married").

198. *See Hicks*, 546 S.W.2d at 73-74 (reiterating that a former spouse has no right to the other spouse's compensation benefits when the benefits compensate for post-divorce disability).

199. *See* Employers Reinsurance Corp. v. Holland, 162 Tex. 394, 396, 347 S.W.2d 605, 606 (1961) (emphasizing that the Texas Workers' Compensation Act compensates for lost earning capacity).

200. *See Hicks,* 546 S.W.2d at 73 (designating as community property that part of a workers' compensation award that compensates for the loss of earning capacity during marriage).

201. *See* General Ins. Co. of Am. v. Casper, 426 S.W.2d 606, 608 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.) (denying the claimant any community interest in incapacity benefits when the incapacity began after the dissolution of the marriage).

202. 426 S.W.2d 606 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

203. *See General Ins. Co. of Am. v. Casper*, 426 S.W.2d at 607.

204. *See id.*

ble award by the Texas Industrial Accident Board, the injured party filed suit.[205] In determining whether any portion of the workers' compensation lump-sum settlement was community property, the appellate court sought to determine whether any portion of the benefits had accrued during the marriage.[206] Because the court found that the parties were married in 1965, before the time when the disability began, the court held that a portion of the compensation benefits was community property.[207]

In the end, despite the decision in *Casper*, the *Lewis* court concluded that the dispositive issue in determining the proper characterization of the entire lump-sum workers' compensation settlement is the time at which the loss of earning capacity commences.[208] Thus, in *Lewis*, the time of injury was the sole determining event, and apportionment could not occur.[209] However, the *Lewis* court decided the case on a per curiam basis without a full discussion of the legal principles and the totality of the case law concerning the issue.

4. The Analytic Approach Has Been Used to Characterize Property Analogous to Workers' Compensation Awards

The supreme court's adoption of the mechanistic approach in *Lewis* is also inconsistent with the manner in which the court has treated similar property in other circumstances. The treatment of benefits similar to workers' compensation, such as tort recoveries, disability, and wage replacement benefits, demonstrates that benefits for loss of earning capacity should be treated similarly, namely by using the analytic approach.[210] In addition, workers' compensa-

205. *See id.*

206. *See id.* at 608.

207. *See id.* at 610.

208. *See* Lewis v. Lewis, 944 S.W.2d 631, 631 (1997) (emphasizing that because the time at which the loss of capacity occurs is determinative, when the loss does not take place during the marriage, the benefits are separate property).

209. *See id.* (explaining that the primary factor in the determination of title was that the injury and loss occurred outside the marriage).

210. *See* Graham v. Franco, 488 S.W.2d 390, 396 (Tex. 1972) (holding that, in determining the division of proceeds received from a personal injury suit, damages for pain and suffering are separate property, whereas damages for lost wages and medical expenses are community property). *But see* Andrle v. Andrle, 751 S.W.2d 955, 956 (Tex. App.—East-

tion benefits are analogous to retirement benefits, which are subject to the analytic approach as well.[211]

a. Tort Recovery for Personal Injury

Tort recovery for personal injury is analogous to workers' compensation because such cases involve the loss of earning capacity.[212] Typically, tort recovery compensates an injured party for injury to the body under such categories as disfigurement and dismemberment, physical pain and suffering, medical expenses, and loss of earning capacity.[213] Texas courts have examined each of these components of tort recovery in establishing community or separate property ownership.[214]

(1) Recovery for Personal Injury: Separate Property

Over one hundred years ago, the Supreme Court of Texas first considered whether recovery for personal bodily injury[215] is sepa-

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land 1988, writ denied) (noting that whether disability benefits are community or separate property is determined by the status of the property at the inception of the title).

211. In the author's view, tort recoveries and disability and wage replacement benefits are more similar to workers' compensation benefits than retirement benefits, but retirement benefit law may be argued in analogy.

212. *See, e.g.*, Ishie v. Kelley, 788 S.W.2d 225, 226 (Ark. 1990) (examining loss of earning capacity in the context of a personal injury suit); Weakley v. Weakley, 731 S.W.2d 243, 244 (Ky. 1987) (discussing the loss of the power to earn money in a personal injury settlement).

213. *See Graham*, 488 S.W.2d at 396 (indicating that damages for disfigurement and physical pain and suffering are available for personal injury); DAN B. DOBBS, TORTS AND COMPENSATION 780 (2d ed. 1993) (noting that damages to compensate a victim of personal injury include medical expenses, lost earning capacity, and pain and suffering); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW, 167-171, 188 (1994) (discussing the various categories of damages for tortious actions, including loss of consortium, future medical expenses, future mental and physical pain, permanent disfigurement and disability, as well as loss of earning capacity).

214. *See Graham*, 488 S.W.2d at 396 (holding that recovery for bodily injury, including both disfigurement and physical pain and suffering, is separate property of the injured party); Dawson v. Garcia, 666 S.W.2d 254, 266 (Tex. App.—Dallas 1984, no writ) (holding that medical expenses recovered during marriage for personal injury are community property); Hicks v. Hicks, 546 S.W.2d 71, 73 (Tex. Civ. App.—Dallas 1976, no writ) (holding that compensation for loss of earning capacity during the marriage is community property).

215. A portion of a personal injury award typically includes compensation for bodily injury, disfigurement and dismemberment, as well as past and future physical pain and suffering. When a judgment fails to specify what portion of the recovery is for disfigurement and pain and suffering, and what part is for loss of earning capacity, the task of categorizing the judgment becomes rather challenging. For example, one could argue that some pain must have accompanied the injury, hence if the spouse was employed there

rate property.[216] In 1883, the supreme court stated in dicta that a chose in action for assault and battery was property, and if acquired during marriage, was separate property.[217] Although correct in light of the law at the time, the decision was not revisited for several decades.

When the supreme court again considered whether a chose in action for personal injury was separate or community property, the court reverted to a test more akin to that applied by Spanish and Mexican law, which forms the basis of the community property system in Texas.[218] In *Graham v. Franco*,[219] the supreme court promulgated an affirmative test, requiring that community property be the result of "the *work, labor and efforts* of the spouses or their agents as income from their property or as a gift to the community."[220] In other words, property acquired by the joint efforts of the community was said to be property acquired by onerous title and belonging to the community.[221] This affirmative test also re-

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could be injury to both separate and community estates. In some cases the solution to this confusion is to apply the community presumption. Proof of separate title involves overcoming a presumption that the property is community. Many marital property jurisdictions rely on the same presumption. As a result, if the presumption cannot be overcome, we never reach the application of either the mechanistic or the analytic approach. At least one court of appeals has held that where the judgment is silent as to the proportion of the recovery, the community presumption should apply and all of the recovery should be characterized as community property. *See* Kyles v. Kyles, 832 S.W.2d 194, 198 (Tex. Civ. App.—Beaumont 1992, no writ) (finding that because the appellee failed to prove what amounts of the settlement were separate or community property, it must be presumed that all the proceeds are community).

216. *See* Ezell v. Dodson, 60 Tex. 331, 332-34 (1883) (discussing the status of damages received by a wife in an action for assault and battery). In *Ezell*, by way of dicta, the court stated that a cause of action for assault and battery would be community property. *See id.* at 332. This same theme was reiterated in *North Texas Traction Co. v. Hill* where the court held that Article 4615 of the Revised Statutes of Texas of 1925 was unconstitutional. *See* North Tex. Traction Co. v. Hill, 297 S.W. 778, 779-80 (Tex. Civ. App. 1927, writ ref'd). This statute, approved by the Texas Legislature in 1915, made the recovery for personal injury of the wife her separate property. *See id.* at 779-80. Finally, coming a full turn, the supreme court in *Graham v. Franco* held that the recovery for personal injury to a spouse would at least in part be separate property. *See Graham*, 488 S.W.2d at 396.

217. *See Ezell*, 60 Tex. at 332 (stating that "[t]he right to sue for damages in a tort case is a chose in action, and property within the legal sense of that term").

218. *See Graham*, 488 S.W.2d at 394 (stating that an injury to the wife gave rise to rights in her separate estate, not to the community).

219. 488 S.W.2d 390 (Tex. 1972).

220. *Graham*, 488 S.W.2d at 392 (emphasis added).

221. *See* Norris v. Vaughn, 152 Tex. 491, 501, 260 S.W.2d 676, 682 (1953) (holding that any property or right by one of the spouses given during marriage by work, talent, or

Leopold: Loss of Earning Capcity Benefits in the Community Property Jurisd

quired that the community property be earned by the spouses. Accordingly, under this view, a cause of action for personal injury was not considered to be entirely community property, as defined by the supreme court in *Graham*.[222]

Subsequently, Texas courts have used a combination of analogy and the analytic method to further support the view that an award for personal bodily injury is separate property.[223] An analogous situation exists when a spouse's separate property, such as a car, is damaged, recovery for the damage to the car is the separate property of the spouse.[224] Therefore, when the spouse's body is injured, the recovery is particular to the injured spouse and should be the separate property of the injured spouse.[225] In the instance of both the car and the bodily injury, the rationale is that the compensation makes the person or property whole again.[226]

(2) Recovery for Medical Expenses and Lost Earning Capacity: Community Property

Unlike recovery for personal injury, any recovery for medical expenses has been considered community property.[227] The rationale behind this notion is that the community bears the liability for paying the medical expenses and suffers a loss for any lack of earning capacity.[228] Therefore, any recovery for such losses should com-

industry is community property); Epperson v. Jones, 65 Tex. 425, 428 (1886) (presuming that all property acquired by the husband or wife during marriage is community property).

222. *See Ezell*, 60 Tex. at 331 (arguing that of the property acquired during marriage, only that property acquired by the wife by gift, devise, or descent is her separate property).

223. *See Graham*, 488 S.W.2d at 396 (holding that recovery for personal injury, "including physical pain and suffering, past and future, is separate property").

224. *See id.* at 394 (analogizing body parts to chattels and real estate in determining separate property).

225. *See id.* (rationalizing that the body a wife brings "into the marriage is peculiarly her own").

226. *See id.* (reasoning that "the recovery is replacement, insofar as practicable, and not the 'acquisition' of an asset by the community estate"); Soto v. Vanderenter, 245 P.2d 826, 832 (N.M. 1952) (opining personal injury compensation to be the injured spouse's separate property because it compensates for the wrongful violation of the injured spouse's personal security).

227. *See Graham*, 488 S.W.2d at 396 (explaining that the community is burdened with paying for those expenses that would otherwise be covered by the lost earnings).

228. *See id.* (reasoning that because both spouses have been damaged, both spouses have a right against the wrongdoer).

St. Mary's Law Journal, Vol. 30 [1998], No. 2, Art. 1

pensate the community portion of the marital estate.[229] The net result is that, to the extent that the community has suffered lost income and expended money for the treatment of the injured spouse, it should be compensated for its contributions.[230] Because of this rationale, the supreme court has chosen to treat this portion of recovery as community property.[231]

Hence, to promote uniformity and consistency, the supreme court should apply the analytic approach and reasoning illustrated above to the loss of earning capacity because this loss represents a deprivation of income. For example, if a person suffers a non-work related injury before the marriage and the incapacity continues into the marriage, the benefits would be apportioned to the extent that the benefits ameliorate the loss of earning capacity during the marriage.

However, a more difficult and distinct problem arises if the compensation is in a lump-sum rather than in installments. Nonetheless, a similar argument, that the non-injured spouse married the incapacity, can be made. Equally applicable are situations where injury occurs during marriage; only that portion of the workers' compensation benefit that relates to the time of marriage is considered community property. If a lump-sum settlement for lost capacity is received during the marriage, it could be allocated between separate property and community property by the use of actuarial and longevity tables. This method of allocation is consistent with the analytic method.

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229. *See id.* (concluding that recovery for medical expenses and lost wages is community in character).

230. *See id.* (stating that both spouses can bring a claim against the wrongdoer).

231. *See id.* (justifying the designation of recovery for lost earnings and medical expenses as community property on the basis that the "marital partnership" incurs medical expenses and suffers from lost earnings). The facts of *Graham* showed that the spouses were married at all times pertinent to the case. *See id.* at 391. The court had no occasion to discuss property interests if the marriage were to terminate. *See id.* at 390. The *Graham* court believed that "[t]he earning capacity, as such, would presumably be translated into earning during the marriage, which would be community property." *Id.* at 396 (quoting WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHAN, PRINCIPLES OF COMMUNITY PROPERTY § 82 (2d ed. 1971)).

b. Disability Insurance—Why *Andrle v. Andrle* Should Not Be Followed

Benefits that may arise under a disability insurance policy, the Veteran's Administration,[232] or the civil service,[233] also involve a loss of earning capacity. In fact, the theory underlying disability benefits is that they are a replacement for lost wages due to the incapacity. Importantly, though, disability benefit cases bear a striking resemblance to cases involving workers' compensation, as they all involve the payment for lost earning capacity.

One of the cases in Texas dealing with a contractual disability benefits policy in a marital property title situation is *Andrle v. Andrle.*[234] In *Andrle*, the husband obtained an individual disability policy during the marriage and paid the premiums with community property.[235] At the time of divorce, the insurance carrier was paying monthly installments to the husband for an injury he suffered during the marriage.[236] The husband agreed that any benefits received during the marriage would be community property, but he also argued that benefits received after the divorce should be his separate property.[237] The court, however, applied the mechanistic

232. *See Ex parte* Johnson, 591 S.W.2d 453, 454 (Tex. 1979) (holding that Veterans' Administration benefits cannot be assigned because they are solely for the benefit of the disabled veteran).

233. *See* Bonar v. Bonar, 614 S.W.2d 472, 473 (Tex. App.—El Paso 1981, writ ref'd n.r.e.) (discussing civil service disability benefits where the injury was incurred after divorce). Although federal law may call for a specific title result contrary to either the mechanistic or analytic approach, those situations that fall within the purview of state law should be treated alike, using the analytic approach. *See Johnson*, 591 S.W.2d at 456 (holding that VA benefits were for the use of the disabled veteran and not subject to partition); *Bonar*, 614 S.W.2d at 473-74 (concluding that the wife had no claim to her veteran husband's disability benefits after divorce, but would have a claim to the retirement benefits).

234. *See* Andrle v. Andrle, 751 S.W.2d 955, 956 (Tex. App.—Eastland 1988, writ denied). At least two other cases in Texas have held the same as *Andrle. See* Simmons v. Simmons, 568 S.W.2d 169, 171 (Tex. Civ. App.—Dallas 1978, writ dism'd) (concluding that disability benefits were community property because they arose by contract during marriage); Matthews v. Matthews, 414 S.W.2d 703, 707 (Tex. Civ. App.—Austin 1967, no writ) (holding that disability insurance carried at the time of the divorce was a property right belonging to the community estate). In these cases, the rationale for the courts' holdings was that disability insurance payments were akin to disability retirement. Furthermore, in *Busby v. Busby*, the supreme court had held that disability retirement would be treated as ordinary retirement for the purpose of division on divorce. *See* Busby v. Busby, 457 S.W.2d 551, 553 (Tex. 1970).

235. *See Andrle*, 751 S.W.2d at 955.

236. *See id.*

237. *See id.* at 955-56.

approach and held that the benefits paid and payable after the divorce would be community property.[238] The court refused to espouse the theory used in a fire insurance case, which held that the title of the proceeds should follow the title of the loss.[239]

At first, the result in *Andrle* seems difficult to explain in terms of natural justice or the expectations of the parties. The only conceivable purpose for Mr. Andrle's disability insurance policy would have been to provide income in the event of an inability to earn income. To the extent that this loss is compensated during the marriage, it would certainly be community property. Conversely, to the extent that it compensates a loss after the marriage, it should be separate property. In *Andrle*, the husband was no more able to work after the divorce than immediately before.[240] Thus, in effect, the court gave the wife alimony benefits for the life of the husband,

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238. *See id.* at 956 (declaring that "[t]he status of property so far as being separate or community property is fixed by facts which existed at inception of the title").

239. *See id.* (stating that the reasoning of *Rolater v. Rolater*, 198 S.W. 391 (Tex. Civ. App.—Dallas 1917, no writ), was inapplicable). In *Rolater*, the court held that the proceeds from a fire insurance policy purchased with the wife's separate funds insuring the husband's separate property house were a replacement for the burned house, taking the same title. *See* Rolater v. Rolater, 198 S.W. 391, 393 (Tex. Civ. App.—Dallas 1917, no writ). Although the fire insurance benefits is not directly analogous to the concept of lost earning capacity, the concept that the benefits stand in place of the loss is analogous. *See Rolater*, 198 S.W. at 393 (placing fire insurance proceeds in place of the fire-destroyed house). Such is illustrated in *Rolater* where the court was not persuaded by the fact that the wife's separate property had paid the premiums for the insurance policy that insured the husband's separate property house. *See id.* at 393 (refusing to convert the husband's separate property into community property merely because the insurance on that property was funded by the wife's separate property). According to the court, the purpose of the policy was clearly to replace the house if it should be destroyed. *See id.* at 392 (asserting the rebuilding of the house as one purpose for the insurance collected).

The decision in *Rolater* contrasts sharply with *Andrle*. The *Andrle* court made an attempt, albeit a cursory one, to distinguish itself from *Rolater*. The *Andrle* court asserted that *Rolater* was decided to prevent the wife from converting husband's separate property into joint property for wholly inadequate consideration and without his consent. *See* Andrle v. Andrle, 751 S.W.2d 955, 956 (Tex. App.—Eastland 1998, writ denied) (considering the underlying purpose of the *Rolater* decision). The *Andrle* court argued conversely that Mrs. Andrle did not convert the husband's separate estate into community. *See id.* (attempting to distinguish the *Rolater* case on the ground that, in this case, no conversion of separate property into community property is involved and that, unlike the house in *Rolater*, the policy here was purchased with community funds). Nevertheless, the *Andrle* court converted the husband's loss of earning capacity for the period of time after the divorce into community property. *See id.* However, the benefits that Mr. Andrle received for the loss of earning capacity after the divorce should have been his separate property.

240. *Cf. Andrle*, 751 S.W.2d at 955 (failing to mention that Mr. Andrle recovered after divorce).

even where there was nothing in the case to indicate that the wife herself did not have a continuing earning capacity.

If the facts were changed under the *Andrle* holding so that the husband had bought the policy before the marriage and had been injured during the marriage, compensation received during the marriage would have been the husband's separate property despite the fact that it was supposed to be replacing his lack of wages at that time. Moreover, if subsequent to the divorce, the husband were to make a "miraculous" recovery, such that the disability payments would stop and earned income resume, there is no doubt that such earned income would be the separate property of the husband. Thus, due to the "unfortunate" recovery of the husband, the ex-wife would lose her community property.

The arguments used with respect to disability insurance here are applicable to workers' compensation benefits and other benefits for loss of earning capacity. Disability insurance, personal injury, and workers' compensation are similar to the extent that the recovery in each is for the injured spouse's inability to continue earning wages. As such, they should be treated similarly when determining marital title upon dissolution of the marriage.

c. Employment Retirement Benefits

At first glance, employee retirement benefits might appear misplaced in a discussion of the division of a workers' compensation settlement upon divorce. However, the topic is useful to evaluate situations wherein Texas courts have determined whether assets are community or separate property when their accrual occurs over a period of time. This Article contends that, like retirement benefits, a wage replacement plan should be allocable over a period of time. Because courts have designed various methods to determine what portion of the retirement fund is separate property and what portion is community property, courts should have no problem in applying similar methods to wage replacement benefits.

Why courts do not apply the methods used to determine the marital title of retirement benefits to loss of earning capacity cases as well is not clear. One reason might be that a factual difference exists between these two rights. In loss of earning capacity cases, the apportionment principle is used only to allocate benefits based on whether the loss is incurred during the marriage or outside of the marriage. In retirement benefits, the goal is to have the bene-

St. Mary's Law Journal, Vol. 30 [1998], No. 2, Art. 1

fits apportioned based on whether they were earned during the marriage or outside of the marriage. Yet, the common thread between the two rights is the analytic, or apportionment, concept.

(1) Property Subject to Division upon Divorce

One might assume that retirement benefits are gifts bestowed on the employee by the employer in reward for the employee's loyalty and service. However, Texas courts have rejected this gift theory.[241] Instead, Texas courts view retirement benefits as a "mode of employee compensation" earned by the employee.[242] Accordingly, retirement benefits are viewed as compensation for the employee's labor, just like regular wages.[243]

Because such benefits are viewed as compensation they cannot, once the worker is married, be categorized only as separate property. To the contrary, the compensation is an onerous acquisition, and therefore, correctly categorized as community property subject to division upon divorce.[244] Such characterization is easily apportioned where the retirement benefits have become available during the marriage. However, the apportionment is also correct when the retirement benefits have not yet become payable.[245] Texas courts have held that a contingent property interest exists in the non-vested retirement plan, which is considered community property subject to division upon divorce.[246] This holding is based on the notion that community property rights can exist in assets that cannot currently be reduced to possession.[247] As a result, Texas

241. *See* Berry v. Berry, 647 S.W.2d 945, 947 (Tex. 1983) (citing Lee v. Lee, 112 Tex. 392, 403-404, 247 S.W. 828, 843 (1923)).

242. *See id.*

243. *See id.*

244. *See* Lee v. Lee, 112 Tex. 392, 403, 247 S.W. 828, 833 (1923) (holding that retirement benefits are not donations to the worker spouse but rather compensation for service).

245. The following example illustrates that retirement benefits not yet payable during marriage are nonetheless community property, subject to division in divorce to the extent that a portion of such benefits correlates to a period the spouse was employed while married. Assume that a military employee spouse has been employed for nineteen years and married for eighteen years at the time of divorce. Also, assume that the employee retirement benefits become available in the twentieth year of employment. If the parties were to divorce at this moment, the employee would not yet have acquired a vested interest in the retirement benefits.

246. *See* Cearley v. Cearley, 544 S.W.2d 661, 663 (Tex. 1976); Trahan v. Trahan, 894 S.W.2d 113, 119 (Tex. App.—Austin 1995, writ denied).

247. *See* Herring v. Blakeley, 385 S.W.2d 843, 847 (Tex. 1965).

courts permit this community property interest to be awarded to the non-employee spouse in a division upon divorce when the retirement benefits vest.[248]

(2) Employment Commenced Prior to Marriage

Assuming as true the supreme court's notion that all assets acquired by onerous title during marriage are community property, applying the mechanistic approach to employee retirement benefits would make absolutely no sense. In fact, not applying this approach is particularly desirable because some part of the benefits at the time of divorce may be separate property, and some part of the benefits may be community property.[249] However, the real difficulty arises in determining how much of the retirement benefit will be considered community property if the divorce occurs before retirement. Because employers use different types of benefit plans, courts have adopted different methods by which to calculate the community portion of benefits for these various plans.

Under a defined benefit plan, the employer typically agrees to compute retirement benefits based on a formula.[250] Such a

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248. *See Cearley*, 544 S.W.2d at 666 (seeking to avoid "an unnecessary multiplicity of suits" in ruling that rights to military pension "prior to accrual and maturity, constitute a contingent interest in property and a community asset" subject to division upon divorce).

249. *See* Dewey v. Dewey, 745 S.W.2d 514, 518-19 (Tex. App.—Corpus Christi 1988, writ denied) (holding that the inception of title theory does not apply to retirement or pension benefits). The *Dewey* court relied on the fact that such benefits are a form of deferred compensation for services performed by the employee-spouse regardless of marriage. *See id.* at 519 (illustrating the deferred nature of the compensation by stating that an employee can only withdraw from the plan upon reaching retirement age, becoming totally disabled, or terminating services with the employer). The court also notes that, under the plan in question, the employee spouse had no vested right in the benefits at the time of divorce or prior. *See id.* at 518. Had the benefits vested prior to the divorce of the parties, the benefits would have been separate property, as they would have been compensation for services performed prior to marriage. *See id.* at 519; *see also In re* Marriage of Joiner, 766 S.W.2d 263, 263-64 (Tex. App.—Amarillo 1988, no writ) (holding that when retirement benefits vest prior to marriage they are characterized as separate property).

250. *See* Humble v. Humble, 805 S.W.2d 558, 560 (Tex. App.—Beaumont 1991, writ denied) (relating that the retirement plan at issue was a defined benefit plan, meaning "that under such plan[,] a specific monthly benefit is derived based upon a formula detailed within the plan"); Steven R. Brown, Comment, *An Interdisciplinary Analysis of the Division of Pension Benefits in Divorce and Post-Judgment Partition Actions: Cures for the Inequities in* Berry v. Berry, 39 BAYLOR L. REV. 1131, 1140 (1985) (explaining that, under a defined benefit plan, "the future benefit to be received is specified in advance according to one of four basic benefit formulas or, more commonly, with some combination thereof").

formula may provide that the retirement benefits will be equal to a percentage of the years employed multiplied by the average of the five highest years' salary. Moreover, a defined benefit plan allows the courts to apply a pro-rated formula to determine the separate and community components of the benefits. The community portion is computed by dividing the months of service while married by the total months of service. Therefore, when the husband has been employed for twenty-four years and married for only twelve of those years, the wife would argue that one half of the retirement benefits are community property.[251]

Under a defined contribution plan, however, the employer agrees to contribute a defined amount to the retirement account.[252] For example, the employer might contribute five percent of salary to the account. When the employee retires, the moneys in the account may be used to purchase an annuity for the retiree or could be distributed in a lump sum. To determine the separate and community components of the retirement benefits, the court must determine the value of the account at the time of marriage, all contributions and interest earned during marriage, and that which is earned after marriage. Only that portion earned during marriage plus the interest thereon is considered community property.[253]

251. *See* Taggart v. Taggart, 522 S.W.2d 422, 423-24 (Tex. 1977) (discussing a military retirement benefit and how to calculate a division of such portion as community property). For an explanation of the difference between a defined benefit plan and a defined contribution plan, see *Baw v. Baw*, 949 S.W.2d 764, 768 (Tex. App.—Dallas 1997, no writ), and Stephen R. Brown, Comment, *An Interdisciplinary Analysis of the Division of Pension Benefits in Divorce and Post Judgment Partition Actions: Cures for the Inequities in* Berry v. Berry, 37 BAYLOR L. REV. 107, 112-17 (1985).

252. *See* Baw v. Baw, 949 S.W.2d 764, 768 n.2 (Tex. App.—Dallas 1997, no writ) (stating that a defined contribution plan participant has an individual account to which either the employer alone or both the employer and the employee contribute monies to the account); Steven R. Brown, Comment, *An Interdisciplinary Analysis of the Division of Pension Benefits in Divorce and Post-Judgment Partition Actions: Cures for the Inequities in* Berry v. Berry, 39 BAYLOR L. REV. 1131, 1137-38 (1985) (stating that a defined contribution plan's benefit amount payable to a retired employee "is determined by the accumulated contributions allocated to that employee at retirement"). Under such a plan, "[t]hese contributions may be made solely by the employer . . . or more commonly by both employer and employee. . . ." *Id.* at 1138.

253. Therefore, where an employee has worked for eight years prior to the time of the marriage and, in that time, has earned retirement benefits, that amount is the separate property of the employee-spouse. From the date of the marriage, the contributions to the account are community property until the marriage is terminated. Typically, this amount can be calculated by subtracting the value of the account at the time of divorce from the

Under either plan, the value in the retirement earned during the marriage is apportioned as community property. This apportionment occurs because only the portion of the retirement plan that is contributed during marriage represents an onerous acquisition by the community. Because compensation for the loss of earning capacity represents a replacement of wages for the disabled worker spouse, this type of apportionment should also be applied to workers' compensation, and other payments for the loss of earning capacity, as well. That is, to the extent a benefit compensates for during-marriage loss of capacity, it should be community property; to the extent it compensates such loss outside of marriage, it should be characterized as the separate property of the disabled worker.

VI. Conclusion

The facts presented in *Lewis v. Lewis* should have led the Supreme Court of Texas to reach a different result. In Texas, workers' compensation is meant to compensate the injured employee for the inability to earn the same income as prior to injury. Just as marital title to compensation changes as the marital status of spouses changes, marital title to workers' compensation recovery should change as well. Such a result is logical because workers' compensation replaces income that would have been earned, but for the injury, regardless of whether before, during, or after the existence of a marriage.

In contrast, the *Lewis* court held that the nature of workers' compensation benefits is determined not necessarily at the time of injury, but at the time of the loss of earning capacity that results from such injury. As other Texas cases point out, the loss of earning capacity begins on a certain date and may continue for a time. In cases similar to *Lewis*, courts have held that the community portion of a workers' compensation lump-sum benefit is measured by determining what portion of the settlement accrues to the spouse during marriage. This portion is community property and the remainder is separate property.[254]

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value of the account at the time of the marriage. *See* Iglinsky v. Iglinsky, 735 S.W.2d 536, 537 (Tex. App.—Tyler 1987, no writ) (recalculating the division of retirement benefits).

254. Furthermore, when the loss of earning capacity begins after the marriage has terminated, there can be no doubt that the entire amount of compensation is separate property. However, when the disability begins before marriage, at least a portion of the

St. Mary's Law Journal, Vol. 30 [1998], No. 2, Art. 1

If the supreme court followed the analytic approach, it would have looked first to the underlying purpose of the award, which is to compensate the injured party for lost earning capacity. Because a portion of that award was meant to compensate the injured party in the future, such as in the case of a permanent disability, some of the award may be "used" by the permanently disabled spouse after a divorce. Thus, to provide for a just result, the apportionment theory should have been used in *Lewis*.

It may be an exaggeration to state that the *Lewis* holding shakes the very foundation on which the community property system stands. Yet, the *Lewis* holding is one broken thread in the fabric and can be repaired by applying the analytic approach in *all* loss of earning capacity benefit cases. The analytic approach that this Article favors is not foreign to Texas. Thus, Texas is well-equipped to join the many states that use an analytic approach in determining whether a lump-sum payment for loss of earning capacity benefits is marital or separate property.

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settlement should be considered community property if the incapacity continues into the marriage. Likewise, the portion of compensation benefits accruing during the marriage should be community property. Thus, the portion of compensation benefits accruing after the marriage ends is separate property. In addition, some portions of a workers' compensation lump-sum settlement may very well be community property when the compensation is for lost earning capacity that would have been earned during marriage. *See* York v. York, 579 S.W.2d 24, 26 (Tex. App.—Beaumont 1979, no writ) (concluding that the trial court properly divided the husband's workers' compensation settlement amount as community property because the husband failed to establish that the settlement was *not* payment for loss of earning capacity during the marriage).

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